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Supreme Court, U.S.
FILED

071286 APR 14 2008

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No.

IN THE

Supreme Court of the United States

W.R. GRACE & CO.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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April 14, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Clean Air Act's criminal provision prohibits the release of substances not covered by the Act's civil provision, where the statute defines the substances covered by the criminal provision by cross-reference to the substances covered by the civil provision.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner W.R. Grace & Co. hereby certifies that it has no parent corporation, and that no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

As the scope of the Nation's environmental laws has expanded over the past generation, so too has the potential for governmental overreaching and abuse. In this case, that potential has become a reality. The Government here is trying to convict defendants of violating the Clean Air Act by releasing substances that the Government itself has excluded from the list of substances covered by the Act. This—under the Act's plain terms, not to mention fundamental norms of fair notice—the Government may not do.

The Ninth Circuit held below, however, that the substances covered by the Act's criminal provision are not limited to the substances covered by the Act's civil provision. According to the Ninth Circuit, "Congress validly may create multiple enforcement mechanisms that each draw on different definitions for the same term or phrase." App. 18a. The problem with that approach is that the Clean Air Act's civil and criminal provisions do *not* "draw on different definitions for the same term or phrase." *Id.* To the contrary, the Act's civil and criminal provisions draw on the *same* list of pollutants: the criminal provision defines the pollutants within its reach by cross-reference to the list of pollutants subject to civil regulation by the Environmental Protection Agency (EPA). It necessarily follows, as a matter of law and logic, that the civil and criminal provisions cover the same pollutants. That approach makes sense: if a particular substance is not even subject to civil regulation under the Clean Air Act, the Government should not be sending people to prison for releasing it.

This case highlights the problem in the starkest of terms: the Ninth Circuit held that the Government may convict defendants of violating the Clean Air Act by releasing "Asbestos" consisting of the minerals winchite and richterite even though the EPA has long defined "Asbestos" under the Act in a way that excludes those two minerals. Indeed, the Ninth Circuit not only held that the EPA's definition of "Asbestos" under the Clean Air Act does not apply in the criminal context, but proceeded to define that term more broadly than any agency of the Federal Government has ever done, and indeed so broadly as to sweep in such everyday materials as talc and fiberglass. There is surely a problem afoot if the definition of "Asbestos" under the Clean Air Act is so open-ended that the Government can send people to prison for up to 15 years for releasing talc into the ambient air.

But the problem is by no means limited to "Asbestos"; rather, it extends to *any* pollutant listed in the Clean Air Act that (like "Asbestos") has been defined by the EPA. To the extent that the EPA has defined the pollutants on the statutory list, individuals and businesses are entitled to rely on those definitions, and to know that such reliance will not later subject them to civil liability—much less criminal prosecution.

And the Ninth Circuit only exacerbated the problem by defending its broad definition of "Asbestos" on the ground that the particular defendants in this case "are all familiar with asbestos." App. 17a. Putting aside the fact that there is absolutely no record support for that assertion—indeed, there *is* no record in this criminal

case other than the allegations in the indictment—the meaning of a criminal statute is not determined by reference to a particular defendant's identity or subjective knowledge. By focusing on the alleged (albeit unproven) knowledge of these particular defendants, the Ninth Circuit essentially transformed the rule of lenity into a rule of severity.

At bottom, by decoupling the substances covered by the Clean Air Act's criminal provision from the substances covered by the Act's civil provision, the Ninth Circuit left the scope of the criminal provision indeterminate and potentially boundless, and deprived individuals and businesses of fair warning about what substances they may, and may not, release under the Act. Given the importance of the Clean Air Act in the framework of the Nation's environmental laws, and the unprecedented and far-reaching nature of the decision below, this Court's review is warranted.

OPINIONS BELOW

The Ninth Circuit's decision is reported at 504 F.3d 745 and reprinted in the Appendix ("App.") at 1-42a. The district court's relevant order is reported at 455 F. Supp. 2d 1122, and reprinted at App. 45-65a.

JURISDICTION

The Ninth Circuit rendered its decision on September 20, 2007, App. 1a, and denied timely petitions for rehearing *en banc* on December 5, 2007, App. 43a. On February 14, 2008, Justice Kennedy granted petitioners' application to extend the time within which to petition for certiorari until April 14, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTES AND REGULATIONS

The criminal provision of the Clean Air Act provides in relevant part:

> Any person who knowingly releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title ... and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment of not more than 15 years, or both. Any person committing such violation which is an organization shall, upon conviction under this paragraph, be subject to a fine of not more than $1,000,000 for each violation.

42 U.S.C. § 7413(c)(5)(A).

The civil provision of the Clean Air Act provides in relevant part:

> (b) List of pollutants
>
> (1) Initial list
>
> The Congress establishes for purposes of this section a list of hazardous air pollutants as follows:

CAS number	Chemical name
*	* *
1332214	Asbestos
*	* *

> (2) Revision of the list
>
> The Administrator shall periodically review the list established by this subsection and

publish the results thereof and, where appropriate, revise such list by rule, adding pollutants which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects ... or adverse environmental effects ....

* * *

(c) List of source categories

(1) In general

Not later than 12 months after November 15, 1990, the Administrator shall publish, and shall from time to time, but no less often than every 8 years, revise, if appropriate, in response to public comment or new information, a list of all categories and subcategories of major sources and area sources (listed under paragraph (3)) of the air pollutants listed pursuant to subsection (b) of this section. ...

(2) Requirement for emissions standards

For the categories and subcategories the Administrator lists, the Administrator shall establish emissions standards under subsection (d) of this section, according to the schedule in this subsection and subsection (e) of this section.

(3) Area sources

The Administrator shall list under this subsection each category or subcategory of area sources which the Administrator finds presents a threat of adverse effects to human

> health or the environment (by such sources individually or in the aggregate) warranting regulation under this section. The Administrator shall, not later than 5 years after November 15, 1990, and pursuant to subsection (k)(3)(B) of this section, list, based on actual or estimated aggregate emissions of a listed pollutant or pollutants, sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the area source emissions of the 30 hazardous air pollutants that present the greatest threat to public health in the largest number of urban areas are subject to regulation under this section. Such regulations shall be promulgated not later than 10 years after November 15, 1990.

42 U.S.C. § 7412.

The EPA has defined "Asbestos" within the meaning of § 7412(b) as follows:

> Asbestos means the asbestiform varieties of serpentinite (chrysotile), riebeckite (crocidolite), cummingtonite-grunerite, anthophyllite, and actinolite-tremolite.

40 C.F.R. § 61.141.

STATEMENT OF THE CASE

A. Background

This case arises out of long-ceased vermiculite mining activities conducted by petitioner W.R. Grace & Co. in and around Libby, a small town in northwestern Montana. App. 3a. By itself, vermiculite is not hazardous; it is a form of mica that expands when heated, and thus has a variety of

commercial uses. Like most mineral ores, however, vermiculite ore often contains other minerals not wanted in the final, commercial product. Among the other minerals found in the vermiculite ore mined near Libby are the amphibole minerals tremolite, winchite, and richterite. App. 46a. Tremolite (which accounts for approximately 5% of the amphibole impurities in Libby vermiculite) is a form of "Asbestos" under EPA regulations, *see* 40 C.F.R. § 61.141; winchite and richterite (which account for approximately 95% of the amphibole impurities in Libby vermiculite) are not. App. 14a, 46-47a.

B. Proceedings Below

In February 2005, a federal grand jury in the District of Montana returned a 10-count indictment charging Grace and seven of its former employees with crimes in connection with the mining, processing, and marketing of Libby vermiculite. App. 4a. Among other things, the original indictment (and a superseding indictment) charged defendants with knowingly endangering persons in and around Libby by releasing "Asbestos" into the ambient air, and conspiring not only to endanger people but also to defraud the Government with respect to the relevant health risks. App. 4-7a.

In August 2006, the district court (Molloy, C.J.) granted defendants' motion in limine to exclude evidence based on the presence of fibers from winchite and richterite, given that these two minerals are not encompassed by the EPA's regulation defining "Asbestos" under the Clean Air Act. App. 45-65a. As the court explained, the Clean Air Act's criminal provision cross-references the list of "hazardous air pollutants" regulated by the EPA,

and thus does not apply to pollutants that are not on that list. App. 54-63a. Because "§ 7413(c)(5)(A) relies upon a civil regulatory statute (§ 7412(b)(1)) for its listing of hazardous air pollutants[,] ... [t]he conundrum the government must explain is why reliance on a civil statute is permissible but reliance on a civil regulation is not." App. 56a.

The Government appealed that order (as well as several other pretrial orders) under 18 U.S.C. § 3731, and (as relevant here) the Ninth Circuit reversed. App. 1-42a. In particular, the Ninth Circuit held that—notwithstanding the statutory cross-reference—the criminal provision of the Clean Air Act applies to alleged pollutants (like winchite and richterite) that are not covered by the civil provision. App. 13-20a. According to the Ninth Circuit, "the Clean Air Act creates multiple enforcement mechanisms: a civil regulatory structure and a [criminal] direct enforcement mechanism," and "the directly enforceable [criminal] provision of the statute ... pulls its definitions from a separate provision than does the regulatory provision." App. 19a. Thus, although the EPA has defined "Asbestos" under the Clean Air Act in a way that concededly does not include either winchite or richterite, *see* 40 C.F.R. § 61.141, the Ninth Circuit held as a matter of law that defendants could be tried, convicted, and fined and/or sent to prison for up to 15 years for releasing those minerals. App. 19a ("[T]he district court improperly limited the term 'asbestos' to the six minerals covered by the civil regulations.").

This petition follows.

REASON FOR GRANTING THE WRIT

The Ninth Circuit Erred By Holding That The Criminal Provision of the Clean Air Act Applies To Alleged Pollutants Not Covered By The Cross-Referenced Civil Provision.

The Ninth Circuit in this case vastly expanded the reach of the criminal provision of the Clean Air Act by holding that the provision applies to releases of alleged pollutants not covered by the Act's civil provision. According to the Ninth Circuit, "the Clean Air Act creates multiple enforcement mechanisms: a civil regulatory structure and a [criminal] direct enforcement mechanism," and the criminal provision "pulls its definitions from a separate provision than does the [civil] provision." App. 19a. That holding is both radical and indefensible as a matter of law and policy, and warrants this Court's review.

A. In Light Of The Statutory Cross-Reference, The Clean Air Act's Criminal Provision Covers The Same Pollutants As The Act's Civil Provision.

The Ninth Circuit asserted that the "civil regulatory system draws its definition[s]" from the EPA's regulations, whereas the criminal system draws its definitions "from 42 U.S.C. § 7412(b)." App. 19a. But § 7412(b) is not a list of pollutants uniquely within the reach of the criminal provision; rather, it is the very list of pollutants within the reach of the civil provision (and brought within the reach of the criminal provision by virtue of the statutory cross-reference in the criminal provision, § 7413(c)(5)(A)). *See, e.g.*, *New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008) (explaining that § 7412(b) "require[s] EPA to regulate more than one

hundred specific [hazardous air pollutants]."); *National Lime Ass'n v. EPA*, 233 F.3d 625, 633-34 (D.C. Cir. 2000) (same). The EPA's regulations, in other words, simply flesh out the definitions of the pollutants listed in § 7412(b). Thus, the Ninth Circuit's assertion that the "civil regulatory system draws its definition[s]" from the EPA's regulations, whereas the criminal system draws its definitions "from 42 U.S.C. § 7412(b)," App. 19a, fundamentally misperceives the statutory structure. Because the criminal provision defines the pollutants within its reach by cross-reference to the pollutants listed in the civil provision, both provisions by definition apply to the *same* pollutants.

The Ninth Circuit thus missed the point by insisting that "Congress validly may create multiple enforcement mechanisms that each draw on different definitions for the same term or phrase." App. 18a. Here, Congress did *not* "draw on different definitions for the same term or phrase." *Id.* To the contrary, Congress expressly defined the pollutants within the reach of the criminal provision by cross-reference to the pollutants within the reach of the civil provision. If a given substance is not within the reach of the Clean Air Act's civil provision, then it is not within the reach of the Act's criminal provision.

Ironically, thus, in purporting to "defer to Congress's decision to create two enforcement structures," App. 19a, the Ninth Circuit actually overrode Congress' decision to apply both those structures to the *same* pollutants. The district court here did not "conflat[e]" two distinct lists of pollutants, *id.*, but simply recognized that Congress enacted a *single* list of pollutants in the Clean Air

Act's civil provision, § 7412(b), and then cross-referenced that list in the Act's criminal provision, § 7413(c)(5)(A). If the pollutants on that statutory list are to be changed, as the Act makes clear, it must be through agency rulemaking under the Administrative Procedure Act. *See* 42 U.S.C. § 7412(b)(2); *see also National Lime*, 233 F.3d at 628.

By declaring that the Clean Air Act "creates multiple enforcement mechanisms," App. 19a, in short, the Ninth Circuit substituted its *own* definition of a pollutant listed in § 7412(b) for the EPA's definition of that very same pollutant under that very same provision. Thus, the court declared that "[i]t is well known that asbestos has a common meaning; it is a fibrous, non-combustible compound that can be composed of several substances, typically including magnesium." App. 16-17a. But that allegedly "well known" definition—*for which the Ninth Circuit provided no citation whatsoever*—is far broader than the definition adopted by the EPA under § 7412(b), which does not include either winchite or richterite, *see* 40 C.F.R. § 61.141 (defining "Asbestos" as "the asbestiform varieties of [1] serpentite (chrysotile), [2] riebeckite (crocidolite), [3] cummingtonite-grunerite, [4] anthophyllite, and [5] actinolite- [6] tremolite").

Similarly, the Ninth Circuit's allegedly "well known" definition of "Asbestos" is far broader than the definition adopted by Congress itself in the Asbestos Hazard and Emergency Response Act of 1986, which (like the EPA's definition) also excludes both winchite and richterite. *See* 15 U.S.C. § 2642(3) ("The term 'asbestos' means asbestiform varieties of—(A) chrysotile (serpentine), (B) crocidolite

(riebeckite), (C) amosite (cummingtonite-grunerite), (D) anthophyllite, (E) tremolite, or (F) actinolite."). And the Ninth Circuit's allegedly "well known" definition is far broader than the definitions adopted by any other federal administrative agency, none of which defines "Asbestos" to include either winchite or richterite. *See, e.g.*, 29 C.F.R. § 1910.1001(b) (Occupational Safety and Health Administration) ("Asbestos includes chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos, actinolite asbestos, and any of these minerals that have been chemically treated and/or altered."); 30 C.F.R. § 71.702(a) (Mine Safety and Health Administration) ("As used in this subpart, the term asbestos means chrysotile, amosite, crocidolite, anthophylite asbestos, tremolite asbestos, and actinolite asbestos but does not include nonfibrous or nonasbestiform minerals."); 16 C.F.R. § 1304.3(b) (Consumer Products Safety Commission) ("Asbestos means a group of mineral fibers composed of hydrated silicates, oxygen, hydrogen, and other elements such as sodium, iron, magnesium, and calcium in diverse combinations and are: Amosite, chrysotile, crocidolite, anthophyllite asbestos, actinolite asbestos, and tremolite asbestos."). Indeed, the Ninth Circuit's definition of "Asbestos" is so broad that it is not even limited to minerals, and sweeps in everyday substances like talc and fiberglass, both of which are "fibrous, non-combustible compound[s] that can be composed of several substances, typically including magnesium." App. 16-17a. It is no accident that neither Congress nor the EPA nor any other federal agency has ever defined "Asbestos" nearly as broadly as has the Ninth Circuit.

While courts are good at many things, defining hazardous air pollutants is not one of them. And that is especially true where, as here, Congress has delegated authority to an administrative agency to define hazardous air pollutants in the first instance. Needless to say, courts are not free to substitute their own interpretation of statutory language for an interpretation adopted by the agency to which Congress duly delegated authority to administer the statute. *See generally Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-44 (1984). That point is particularly compelling here, because the Ninth Circuit in no way suggested that the EPA's definition of "Asbestos" under § 7412(b) is invalid. To the contrary, the Ninth Circuit acknowledged that the EPA's definition is entirely appropriate in the civil context. *See* App. 19a. The Ninth Circuit simply held that the EPA's definition has no bearing in the criminal context, *see id.*, and thereby allowed the Government to prosecute defendants under the Clean Air Act for releasing minerals that are *not* "Asbestos" under § 7412(b) as defined by the EPA, notwithstanding the explicit statutory cross-reference.

Indeed, not even the Government argued below that the Ninth Circuit was free to devise its *own* definition of "Asbestos" within the meaning of § 7412(b) as a matter of law. Rather, the Government argued that the "statutory definition" of the pollutants listed in § 7412(b) is the definition provided at any given moment in time by the Chemical Abstract Service (CAS), a private entity, in a private database that can be accessed only by paid subscribers. That is so, the Government asserted, because the pollutants listed in § 7412(b) are

identified in the statute by reference to their CAS numbers. Under this view, the definition of the pollutants listed in the statute changes whenever CAS changes its definition of a particular substance on the statutory list.

Putting aside the fundamental anomaly (and dubious constitutionality) of supposing that Congress delegated the authority to define a statutory term to an unaccountable private party to change at will, *see, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 311-12 (1936), the Government cannot have it both ways. If indeed the CAS numbers in the statute are more than just a convenient shorthand to identify particular substances, but instead provide binding "statutory definitions" of the pollutants listed in § 7412(b), then the EPA has no authority to deviate from those definitions (as it has done for "Asbestos" and other listed pollutants). Because the Government has never suggested that the EPA's longstanding regulatory definition of "Asbestos" under § 7412(b) is invalid, its approach cannot be right. Either the EPA is bound by the CAS definitions of the pollutants listed in § 7412(b) or it is not, and if it is not, then its reasonable definitions of those pollutants are as valid in the criminal context as in the civil context. By holding that the criminal provision applies to alleged pollutants concededly not covered by the civil provision, the Ninth Circuit destroyed the clear statutory congruence established by the cross-reference in § 7413(c)(5)(A).

B. By Decoupling The Clean Air Act's Civil And Criminal Provisions, The Ninth Circuit Leaves The Scope Of The Criminal Provision Indeterminate And Potentially Boundless.

The Ninth Circuit's decision not only flouts the Clean Air Act's plain language, but also leaves the scope of the Act's criminal provision indeterminate and potentially boundless. This case perfectly illustrates the point. As noted above, the EPA defines "Asbestos" within the meaning of § 7412(b) in a way that does not include the minerals winchite and richterite. *See* 40 C.F.R. § 61.141. That definition has been on the books, essentially unchanged, for the past thirty-five years. *See* 38 Fed. Reg. 8820, 8829 (April 6, 1973). Indeed, that definition was on the books at the time of the 1990 amendments that added the criminal provision to the Clean Air Act (and the cross-reference to the list of pollutants subject to civil regulation). Nonetheless, the Ninth Circuit has now held that the Government may prosecute defendants for releasing "Asbestos" within the meaning of § 7412(b) consisting of winchite and richterite. Simply to state that holding is to refute it.

A basic tenet of our criminal law, after all, is that a defendant must have "fair warning" of the conduct that may result in criminal liability. *See, e.g.*, *United States v. Lanier*, 520 U.S. 259, 266 (1997). Needless to say, a defendant cannot have had "fair warning" that winchite and richterite are "Asbestos" within the meaning of § 7412(b) when (as the district court noted) neither winchite nor richterite falls within the definition of "asbestos" as that term "has historically

been used by every governmental regulatory agency to address the issue," App. 45a—*including* the EPA, which has specifically defined "Asbestos" within the meaning of the Clean Air Act. Given that the EPA has specified what minerals are, and are not, encompassed by the term "Asbestos" in § 7412(b), the Government cannot possibly establish that individuals and businesses had "fair warning" that *other* minerals, like winchite and richterite, are encompassed by that term. The American criminal justice system is not Wonderland, where a prosecutor (like Humpty Dumpty) can choose a word to mean "'just what *I* choose it to mean—no more and no less.'" *TVA v. Hill*, 437 U.S. 153, 173 n.18 (1978) (quoting Lewis Carroll, *Through the Looking Glass*, in *The Complete Works of Lewis Carroll* 196 (1939)) (emphasis in original).

Under these circumstances, the Ninth Circuit had no basis for holding as a matter of law that winchite and richterite are "Asbestos" for purposes of the Clean Air Act's criminal provision but not its civil provision. Indeed, not even the Government took that position below; instead, the Government argued that whether winchite and richterite are "Asbestos" within the meaning of § 7412(b) is a matter for a *jury* to determine based on expert scientific testimony. As the district court explained, "[a] defendant on trial for releasing 'asbestos' would be apprehensive about the prospect of his fate turning on which expert the jury found most persuasive in describing which minerals fall within the scope of the criminal offense." App. 55a.

The Ninth Circuit insisted, however, that a broad definition of "Asbestos" within the meaning of

§ 7412(b) is appropriate because the particular defendants in this case had "actual notice" of the hazards posed by winchite and richterite. App. 17a. According to the Ninth Circuit, "[d]efendants are an industrial chemical company and seven of its top executives," who "are all familiar with asbestos," and "[s]ince at least 1976, ... have known of the health risks posed by the asbestiform minerals in their products." *Id.*; *see also id.* ("It is clear that defendants knew or should have known that their mining, milling, and distribution activities risked the release of asbestos into the ambient air.").

As an initial matter, the Ninth Circuit had no basis whatsoever for making these assertions with respect to defendants' knowledge. There is no factual record in this case; there is only an indictment. The indictment consists of allegations, and in our legal system, defendants—no matter how unpopular—are presumed innocent, not guilty, of the allegations in the indictment unless and until they are convicted by a jury after the Government proves those allegations beyond a reasonable doubt. *See, e.g.*, *In re Winship*, 397 U.S. 358, 364 (1970). The Ninth Circuit never explained how any of the defendants here possibly could have had "actual notice" that both winchite and richterite are "Asbestos" under § 7412(b) when the EPA itself excludes both winchite and richterite from the definition of "Asbestos" under § 7412(b).

In any event, a particular defendant's knowledge is irrelevant to a statute's meaning. A statute means what it means; a basic tenet of the rule of law is that the meaning of the law does not change depending on the identity of the person to whom the law is applied.

Thus, either winchite and richterite are "Asbestos" within the meaning of § 7412(b) or they are not. Those minerals do not either become, or cease to be, "Asbestos" based on the identity of any particular defendant charged with releasing those minerals in any particular case. The criminal provision of the Clean Air Act proscribes the knowing release of the specific pollutants listed in § 7412(b), not the knowing release of any substance that a particular defendant knows or has reason to know is hazardous. *See* 42 U.S.C. § 7413(c)(5)(A).

The Ninth Circuit thus turned the law upside down by declaring that "the district court erred ... in invoking the rule of lenity" in part because of "defendants' knowledge of the industrial chemicals field." App. 17a. The rule of lenity "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *Lanier*, 520 U.S. at 266; *see also Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284-85 (1978) (applying the rule of lenity in a criminal prosecution under the Clean Air Act). Contrary to the Ninth Circuit's suggestion, application of the rule of lenity does not turn on any particular defendant's *subjective* knowledge. Rather, application of the rule of lenity turns on whether a statute, as an *objective* matter, provides "fair warning ... in language that the *common world* will understand, of what the law intends to do if a certain line is passed." *Lanier*, 520 U.S. at 266 (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (emphasis added)). If a statute does not provide "fair warning" to the "common world," then the rule of lenity applies *regardless* of any particular defendant's identity or subjective knowledge.

The practical implications of the Ninth Circuit's decision are staggering. The Clean Air Act by its plain terms applies only to the pollutants listed in § 7412(b). To the extent that the EPA has validly defined those pollutants (which is not contested here with respect to the EPA's definition of "Asbestos"), individuals and businesses are entitled to rely on those definitions, and arrange their conduct accordingly. By holding that the EPA's definitions of the pollutants listed in § 7412(b) apply only in the civil context, as opposed to the criminal context, the Ninth Circuit has stripped individuals and businesses of any ability to arrange their conduct by reference to the definition established by the agency to which Congress expressly delegated authority to administer § 7412(b).

If anything, the Government's actions in this very case only highlight the problem. From the beginning, the Government was aware that the bulk of amphibole impurities in Libby vermiculite consisted of winchite and richterite, which do not fall within the EPA's definition of "Asbestos" under § 7412(b). *See, e.g.*, CA9 Supp. Excerpts of R. 268-71; *see also id.* at 278 (Testimony of Kathleen Rest, Acting Director of the National Institute for Occupational Safety & Health, Centers for Disease Control & Prevention, to U.S. Senate Committee on Health, Education, Labor, & Pensions) (7/31/01) ("A much higher proportion—80 to 90%—of the fiber contaminant in [Libby] vermiculite has been characterized as several other similar fibers *that are not currently regulated as asbestos, such as richterite and winchite*.") (emphasis added). Although analysts working with the EPA initially distinguished those two minerals from tremolite (which does fall within

the agency's definition of "Asbestos," but accounts for only about 5% of the amphibole impurities in Libby vermiculite), the agency instructed them to lump winchite, richterite, and tremolite together under the term "Libby-type amphibole" so that no one would "be able to differentiate among them." *Id.* at 268-69. As an official from the Agency for Toxic Substances and Disease Registry made clear in recounting a conversation with an official from the EPA, this was done precisely to thwart the argument that the substances at issue here are not "Asbestos" within the meaning of the Clean Air Act: "EPA is now calling the Libby stuff 'fibrous amphibole or Libby amphibole.' ... My understanding of this issues [sic] is that labeling the Libby materials as tremolite asbestos then leaves the [defendants'] lawyers open to say that the material is not regulated. If we call it asbestos then the lawyers still can say it is not one of the 6 regulated asbestos types. So calling the material another name and saying that it is hazardous to health gets around that loophole in the law." *Id.* at 271. Of course, the EPA's definition of the statutory term "Asbestos" in § 7412(b) is not a "loophole"; it is what gives individuals and businesses fair notice about what substances are, and are not, encompassed by that term.

As anyone familiar with the American legal landscape over the past generation can attest, the proper definition of "Asbestos," in and of itself, presents an issue of the first importance. For many years, asbestos was widely used across the Nation. The resulting massive exposure, as this Court has recognized, has bedeviled our legal system, resulting in an "elephantine mass of asbestos cases [that] defies customary judicial administration." *Ortiz v.*

Fibreboard Corp., 527 U.S. 815, 821 (1999). In light of this ongoing situation (which has driven petitioner Grace as well as many other companies into bankruptcy), it is probably an understatement to say that it is important for individuals and businesses to know what "Asbestos" means within the meaning of the Clean Air Act, and to know that they can rely on the EPA's definition of that statutory term in both the civil and criminal contexts.

And even putting aside the singular importance of asbestos, the issue here is by no means limited to asbestos. Rather, the issue presented here applies to *any* pollutant listed in § 7412(b) that has been defined by the EPA. *See, e.g.*, 40 C.F.R. § 63.341 ("Chromium compounds"); 40 C.F.R. § 63.1196 ("Formaldehyde"); 40 C.F.R. § 61.51 ("Mercury compounds"); 40 C.F.R. § 92.2 ("Methanol"). To the extent that the EPA has defined these statutory terms, individuals and businesses are entitled to rely on those definitions, and to know that such reliance will not later subject them to civil liability—much less criminal prosecution.

The bottom line is that nothing in the Clean Air Act remotely suggests that the Government may prosecute individuals or businesses for releasing substances that the EPA has excluded from its definitions of pollutants listed in § 7412(b). To the contrary, the cross-reference to that list in the Act's criminal provision, § 7413(c)(5)(A), affirmatively establishes a congruence between the Act's civil and criminal provisions. By decoupling those provisions, the Ninth Circuit thus undermined the entire statutory structure, fundamentally destabilized an important area of the law, and exposed individuals

and businesses to indeterminate and potentially boundless criminal liability.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

April 14, 2008

Respectfully submitted,

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APPENDIX

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. W.R. GRACE; ALAN R. STRINGER; HENRY A. ESCHENBACH; JACK W. WOLTER; J. MCCAIG; ROBERT J. BETTACCHI; O. MARIO FAVORITO; ROBERT C. WALSH, *Defendants-Appellees.*	No. 06-30472 D.C. No. CR-05-00007-DWM
UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. W.R. GRACE; ALAN R. STRINGER; HENRY A. ESCHENBACH; JACK W. WOLTER; WILLIAM MCCAIG; ROBERT J. BETTACCHI; O. MARIO FAVORITO; ROBERT C. WALSH, *Defendants-Appellees.*	No. 06-30524 D.C. No. CR-05-00007-DWM OPINION

Appeal from the United States District Court
for the District of Montana
Donald W. Molloy, District Judge, Presiding

Argued and Submitted
June 4, 2007 — Seattle, Washington

Filed September 20, 2007

Before: Betty B. Fletcher, Harry Pregerson, and
Warren J. Ferguson, Circuit Judges.

Opinion by Judge B. Fletcher

COUNSEL

Todd S. Aagaard, Dept. of Justice Environment and Natural Resources Division, Washington, D.C., and Kris A. McLean, Assistant United States Attorney, Missoula, Montana, argued for the government. With them on the briefs were Sue Ellen Wooldridge, Assistant Attorney General; William W. Mercer, United States Attorney; Eric E. Nelson, Linda Kato, Special Assistant United States Attorneys; Kevin M. Cassidy, and Allen M. Brabender, Attorneys, United States Dept. of Justice Environment and Natural Resources Division.

Christopher Landau, Washington, D.C., argued for defendant-appellee W.R. Grace & Co. With him on the brief were Laurence A. Urgenson, Tyler D. Mace, Michael D. Shumsky, Washington, D.C.; Stephen R. Brown, Charles E. McNeil, Kathleen L. DeSoto, Missoula, Montana, for defendant-appellee W.R. Grace & Co.; Angelo J. Calfo, Seattle, Washington; Michael F. Bailey, Missoula, Montana, for defendant-appellee Alan R. Stringer; Ronald F. Waterman, Helena, Montana; David S. Krakoff, Gary A. Winters, Washington, D.C., for defendant-appellee Henry A. Eschenbach; Mike Milodragovich, W. Adam Duerk, Missoula, Montana; Mark Holscher, Jeremy Maltby, Los Angeles, California, for defendant-appellee Jack W. Wolter; Palmer Hoovestal, Helena, Montana, Elizabeth Van Doren Gray, Columbia, South Carolina, William A. Coates, Greenville, South Carolina, for defendant-appellee William J. McCaig; Brian Gallik, Bozeman, Montana, Thomas C. Frongillo, Boston, Massachusetts, Vernon S. Broderick, New York, New York, for defendant-appellee Robert J. Bettacchi; C.J. Johnson, Missoula, Montana,

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OPINION

B. FLETCHER, Circuit Judge:

From 1963 until the early 1990s, W.R. Grace ("W.R. Grace" or "Grace") mined and processed a rich supply of vermiculite ore outside of Libby, Montana. In response to ongoing serious health problems suffered by Libby residents, the government obtained an indictment charging W.R. Grace and seven of its executives (together "Grace") with criminal conduct arising from Grace's vermiculite operation in Libby. The superseding indictment charges defendants-appellees with (1) conspiring knowingly to release asbestos, a hazardous air pollutant, into the ambient air, thereby knowingly placing persons in imminent danger of death or serious bodily injury in violation of 42 U.S.C. § 7413(c)(5)(A) and (2) conspiring to defraud the United States in violation of 18 U.S.C. § 371. In addition to the dual-object conspiracy alleged in Count I, the indictment charged defendants-appellees with three counts of knowing endangerment under the Clean Air Act, 42 U.S.C. § 7413(c)(5)(A), and four counts of obstruction of justice in violation of 18 U.S.C. §§ 1505 and 1515(b).

This interlocutory appeal brought by the government concerns six orders grouped into four sections: the first order dismissed the knowing endangerment object of Count I's conspiracy charge; the second adopted a particular definition of asbestos

and excluded evidence inconsistent with that definition; the third denied a motion to exclude evidence related to an affirmative defense and relied on an emission standard for asbestos contained in certain Environmental Protection Agency ("EPA") regulations, *see, e.g.*, 40 C.F.R. §§ 61.142-61.149; and the fourth through sixth orders excluded certain evidence and expert testimony. In addition, we rule on defendants-appellees' motion to strike documents attached to the government's reply brief. We have jurisdiction to hear this appeal pursuant to 18 U.S.C. § 3131, and we reverse in part, affirm in part, and remand.

I. Dismissal of the Knowing Endangerment Object

1. Background

In the original indictment, filed February 7, 2005, the government charged defendants with participating in a dual-object conspiracy. According to Count I of the indictment, which details the scope of the conspiracy, defendants conspired (1) to knowingly release asbestos, a hazardous air pollutant, and thus knowingly to endanger both EPA employees and members of the Libby community in violation of 42 U.S.C. § 7413(c)(5)(A) ("knowing endangerment object"); and (2) to defraud the United States by impairing, impeding, and frustrating government agency investigations and cleanup operations in violation of 18 U.S.C. § 371 ("defrauding object"). On March 20, 2006, defendants moved to dismiss the knowing endangerment object of the conspiracy, arguing that the government had failed to allege an overt act in furtherance of the alleged conspiracy within the

statute of limitations period. *United States v. W.R. Grace*, 434 F. Supp. 2d 879, 883 (D. Mont. 2006).

Defendants' argument relied primarily on *Yates v. United States*, 354 U.S. 298 (1957) (holding that the statute of limitations must be satisfied as to each object of the conspiracy when the government charges a multi-object conspiracy), *overruled on other grounds by Burks v. United States*, 437 U.S. 1, 2 (1978). Because the government supposedly had failed to allege a requisite overt act before the statute of limitations ran on November 3, 2004, defendants asserted that the knowing endangerment object was time-barred.

The government disputed defendants' characterization of the indictment, claiming that certain overt acts alleged in the indictment could support both the fraud object and the knowing endangerment object of Count I's conspiracy charge. Towards this end, the government directed the district court's attention to paragraphs 143, 149, and 173-184 of the indictment. *W.R. Grace*, 434 F. Supp. 2d at 885-87. The paragraphs cited by the government alleged that defendants had failed to remove asbestos-contaminated material from sites in the Libby community, had misled various individuals regarding current asbestos contamination, and had failed to disclose the existence of numerous asbestos-contaminated sites. What the paragraphs purportedly failed to allege was that defendants released, or conspired to release, asbestos during the relevant time period.

Analyzing both the text of the specified paragraphs and the structure of the indictment, in which the cited paragraphs were listed under the sub-heading "Obstruction of EPA's Superfund Clean-

Up," the district court concluded that the indictment "more plausibly suggests a completed operation than a conspiracy still at work." *Id.* at 887. To the extent that overt acts were alleged, the district court found that they were acts of obstruction, not acts of wrongful endangerment. *Id.* Thus, the district court dismissed as time-barred the knowing endangerment object of the Count I conspiracy. *Id.* at 888.

Two weeks after the district court's first order, dismissing a portion of the indictment, the government obtained a superseding indictment. The new indictment was substantially similar to the original indictment, amending only paragraphs 1731-83, which had been the focus of the district court's previous order. In the superseding indictment, the government changed the section heading under which the disputed paragraphs had been listed from "Obstruction of Superfund Clean-Up" to "Knowing Endangerment of EPA Employees and the Libby Community and Obstruction of the EPA's Superfund Clean-Up." It also changed paragraphs 173, 174, 176-80, 182 and 183, by adding at the end of each original paragraph the phrase, "thereby concealing the true hazardous nature of the asbestos contamination, delaying EPA's investigation and causing releases of asbestos into the air in the Libby Community."[1]

Defendants then moved to dismiss the "knowing endangerment" object of the superseding indictment, arguing that the government had failed to fix the

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[1] Paragraph 175 was changed significantly.

original indictment because the new indictment alleged no new overt acts, was barred by the previous dismissal "with prejudice," and was time-barred because the statute of limitations had run. The district court rejected the first two arguments, but agreed with defendants that the new indictment was time-barred. Under the district court's reading, the superseding indictment was not protected by the savings clause of 18 U.S.C. § 3288. Order at 17, *United States v. W.R. Grace*, 9:05-cr-00007-DWM ("Order Dismissing Indictment") (July 27, 2006) (Docket # 690). The government now appeals that determination.

2. Standard of Review

We review de novo a district court's decision to dismiss part of an indictment, *United States v. Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991), as we review, also de novo, the district court's interpretation of 18 U.S.C. § 3288. *United States v. Gorman*, 314 F.3d 1105, 1110 (9th Cir. 2002).

3. Analysis

If a district court dismisses an indictment (or portion thereof), the savings clause of 18 U.S.C. § 3288 permits the government to return a new indictment after the statute of limitations has expired, as long as it is done within six months of the dismissal. The statute reads as follows:

> Whenever an indictment or information charging a felony is dismissed for any reason after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the

> indictment or information ..., which new indictment shall not be barred by any statute of limitations. This section does not permit the filing of a new indictment or information where the reason for the dismissal was the failure to file the indictment or information within the period prescribed by the applicable statute of limitations, or some other reason that would bar a new prosecution.

The dispute in the instant case stems from the parties' divergent interpretations of the final sentence of § 3288. This sentence explains that the savings clause does not extend to indictments initially filed outside of the statute of limitations. The government takes the position that this does not bar the return of the new indictment because the original indictment was obtained before the statute of limitations expired. Thus, the government argues, § 3288 permits amendment by a superseding indictment. Defendants disagree, arguing that the government failed to allege an overt act for the knowing endangerment object of the conspiracy before the statute of limitations expired. The district court agreed with defendants and dismissed the knowing endangerment object as time-barred.

Defendants' argument is premised on a conflation of the terms "time-barred" and "not timely filed." The last sentence of § 3288 refers to indictments that were not timely filed, i.e., indictments that were not filed within the statute of limitations. Here, there is no dispute that the government *filed* its indictment within the statute of limitations period. The district court dismissed the knowing endangerment object in the original indictment as "time-barred" because it

failed to allege an overt act within the statute of limitations, not because the indictment was untimely filed. The district court erred. If the indictment is filed within six months of the dismissal order, § 3288 does not bar the government from filing a superseding indictment: the savings clause of § 3288 permits amendment when the original was structurally flawed but timely filed. *United States v. Clawson*, 104 F.3d 250 (9th Cir. 1996).

In *Clawson*, the defendant was indicted for mail fraud on June 10, 1993. *Id.* at 251. Defendant immediately moved to dismiss the indictment for failure to allege an overt act within the five-year statute of limitations. *Id.* The indictment alleged overt acts that occurred before the limitation period began on June 10, 1988, or after defendant's withdrawal from the conspiracy on July 5, 1988. *Id.* The district court granted defendant's motion to dismiss the indictment and the government responded by obtaining a First Superseding Indictment, which alleged overt acts occurring in the window between June 10, 1988, and July 5, 1988. *Id.* Defendant then moved to dismiss the new indictment, arguing that the statute had run before the government obtained the First Superseding Indictment and that § 3288 did not extend to indictments dismissed for failure to comply with the statute of limitations. *Id.* The district court denied his motion and we affirmed. *Id.* at 251-52.

Clawson noted that when "[r]ead in its entirety, th[e] last sentence [of § 3288] cuts off the six-month grace period only where the defect—whether it's a limitations problem 'or some other' problem—is not capable of being cured." *Id.* at 252. In the instant case, the district court held (and defendants now

argue) that the defect in the original indictment obtained by the government is not capable of being cured because the original indictment did not allege an overt act for the knowing endangerment object before the statute of limitations expired. This position, however, is precluded by *Clawson*.

In *Clawson* we distinguished between a timely filed, but flawed, indictment, to which the savings clause of § 3288 does apply, and an untimely filed indictment, to which it does not.

> "[I]f the original indictment was brought after the limitations period ran on all the alleged criminal conduct, allowing reindictment under section 3288 would obliterate the statute of limitations: A defendant could be indicted two years after the statute had run and, when the court dismissed, the prosecution could simply reindict within six months, free from the limitations bar." *Id.*

For obvious reasons, reindictment is prohibited by § 3288 in such circumstances. *Id.*

> "The matter is much different where the original indictment is brought within the limitations period, but is dismissed for failure to allege the exact elements of the crime, or some other technical reason. In the latter circumstance, a valid indictment could have been brought in a timely fashion; the six-month grace period merely allows the government to do what it had a right to do in the first place." *Id.*

The latter circumstance describes the facts of both *Clawson* and the instant case. In both cases,

the government timely indicted defendants for a particular crime, but originally failed to allege a valid overt act. The government then obtained superseding indictments charging defendants with the exact same crimes, but adding the necessary overt act allegations. Thus, each defendant was charged "with the exact crime for which he could have been prosecuted had there not been a defect in the indictment. Section 3288 was designed to apply in this situation." *Id.; see also United States v. Charnay*, 537 F.2d 341, 354 (9th Cir. 1976) ("[The] underlying concept of § 3288 is that if the defendant was indicted within time, then approximately the same facts may be used for the basis of any new indictment [obtained after the statute has run] ... , if the earlier indictment runs into legal pitfalls.").

When discussing "timeliness," both *Clawson* and *Charnay* refer to the time of the original filing of the indictment. They do not consider whether the original indictment included all of the relevant acts or elements necessary to charge defendants with the crime. As long as the original indictment is filed within the statute of limitations and charges the same crime, based upon approximately the same facts charged in the superseding indictment, § 3288 allows the government to file a superseding indictment within six months. *See* 18 U.S.C. § 3288; *Clawson*, 104 F.3d at 251-52; *Charnay*, 537 F.2d at 354. Here, the parties do not dispute that the original indictment was timely filed. The district court's holding that the indictment was time-barred referred only to its failure to allege the necessary overt acts in the original indictment—a flaw that can be cured through re-indictment under § 3288.

The district court attempted to distinguish *Clawson*, stating that in *Clawson* the government alleged overt acts in the original indictment, which was filed within the limitations period. This distinction is irrelevant. While the government did allege overt acts before the limitations period expired in *Clawson*, it failed to allege an overt act sufficient to support the conspiracy charge since the only overt acts alleged occurred outside the statute of limitations or subsequent to Clawson's withdrawal from the conspiracy. Thus, the government originally failed to allege any relevant overt acts in *Clawson*, just as in the instant case.

Moreover, *Clawson* did not turn on the distinction advanced by the district court: as we have explained, § 3288 applies when an indictment (though defective) is brought within the limitations period, and the superseding indictment charges defendant with the same exact crime with which he was initially charged, based on approximately the same facts. The only addition in the new indictment considered in *Clawson* was the inclusion of new overt acts that the government could have used in the original indictment. The fact that the government had timely alleged inapplicable overt acts was wholly extraneous to the *Clawson* court's decision.

The district court's misapprehension of both *Clawson* and § 3288 is also clear from its statement that "[t]o allow the government a six-month grace period in this case would extend the statute of limitations for the improper purpose of affording the prosecution a second opportunity to do what it failed to do in the beginning." Order Dismissing Indictment at 16. Yet this is exactly what § 3288

does. It extends the statute of limitations by six months to allow the prosecution a second opportunity to do what it failed to do in the beginning: namely, file an indictment free of legal defects.

This reading of § 3288 does not, as the district court suggests, "require a defendant to remain subject to an indefinite threat of prosecution, held open beyond the statute of limitations period, while he and the court wait for the government to finish tinkering with the indictment." *Id.* What § 3288 does is twofold: First, it eliminates the incentive for criminal defendants to move for dismissal of an indictment at the end of the statute of limitations, thereby winning dismissal at a time when the government cannot re-indict. And second, it subjects defendants to the threat of prosecution for six months after the dismissal of the original indictment—not an indefinite threat of prosecution as the district court suggests—and only if the government has timely filed an indictment charging the exact same crimes based on approximately the same facts.

For the reasons articulated herein, we reverse the district court's dismissal of the knowing endangerment object of Count I in the superseding indictment and reinstate that portion of the count.

II. Definition of Asbestos

1. Background

We now turn to the question of whether Congress's use of the term "asbestos" to identify a hazardous air pollutant created ambiguity as to what substance was meant by that term. The parties filed cross motions in limine to exclude

evidence that fell outside their respective interpretations of the term. Govt. Mot. in Limine #2 Re: Definition of Asbestos (Docket # 462); Defs' Mot. in Limine Re: Definition of Asbestos (Docket # 474). The district court held that the term "asbestos" has no inherent meaning and therefore its use in the criminal provisions of the Clean Air Act violated the rule of lenity and the Due Process Clause of the Fourteenth Amendment. It interpreted asbestos for purposes of the Clean Air Act's knowing endangerment provision to mean the six minerals covered by EPA's civil regulatory scheme. Order at 2 & 20, *United States v. W.R. Grace*, 9:05-cr-00007-DWM ("Order Defining Asbestos") (Aug. 8, 2006) (Docket # 701). That regulation defines the civilly regulated species of asbestos as "the asbestiform varieties of serpentinite (chrysotile), riebeckite (crocidolite), cummingtonite-grunerite, anthophyllite, and actinolite-tremolite." Definitions for National Emission Standards for Hazardous Air Pollutants ("NESHAPs"), 40 C.F.R. § 61.141 (2007).

The district court imported the civil regulatory definition of "asbestos" into the criminal provisions of the Clean Air Act, and then ruled that evidence of asbestos releases offered at trial would be limited to those relevant to proving releases of the six minerals included in the regulatory definition; evidence of releases of other asbestiform minerals would be excluded. Order Defining Asbestos at 22. This ruling eliminated from trial evidence of releases of 95% of the contaminents in the Libby vermiculite—which are asbestiform minerals but fall outside of the six minerals in the civil regulatory definition—as well as excluding government data that did not differentiate between the six regulated minerals and unregulated asbestiform minerals. The government

appeals, asserting that the definition contained in the criminal portion of the statute is the applicable definition.

2. Standards of Review

We review de novo the district court's construction of the Clean Air Act, as we do rulings on the admissibility of evidence in which issues of law predominate. *See United States v. Mateo-Mendez*, 215 F.3d 1039, 1042 (9th Cir. 2000).

3. Analysis

The Clean Air Act's knowing endangerment provision prohibits the knowing and dangerous release into the ambient air of "any hazardous air pollutant listed pursuant to § 7412." 42 U.S.C. § 7413(c)(5)(A).[2] Section 7412(b) lists "asbestos," also

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[2] 42 U.S.C. § 7413(c)(5)(A) reads in relevant part:

> Any person who knowingly releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title ... , and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment of not more than 15 years, or both. Any person committing such violation which is an organization shall, upon conviction under this paragraph, be subject to a fine of not more than $1,000,000 for each violation. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment. For any air pollutant for which the Administrator has set an emissions standard or for any source for which a permit has been issued under subchapter V of this chapter, a release of such pollutant in accordance with that standard or permit shall not constitute a violation of this paragraph or paragraph (4).

identified by its Chemical Abstracts Service ("CAS")[3] Registry number 1332-21-4, as a hazardous air pollutant. 42 U.S.C. § 7412(b). Thus, § 7412(b) identifies asbestos by name and defines it through reference to CAS Registry # 1332-21-4.

The government contends that a statute may have two definitions for one term, one definition civil and one criminal. Further, it argues that the definition of asbestos applicable to the Clean Air Act's criminal knowing endangerment provision covers the minerals involved in this case. We agree on both points.

The district court found § 7412(b)'s "one-word definition"[4] to be "unsatisfactory" as a matter of law. However, Congress need not define every word in a criminal statute for the statute to pass Constitutional muster. When Congress does not define a term in a statute, we construe that term "according to [its] ordinary, contemporary, common meaning[]." *United States v. Cabaccang*, 332 F.3d 622, 626 (9th Cir. 2003) (en banc) (internal quotation marks omitted). It is well known that asbestos has a common meaning; it is a fibrous, non-combustible

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[3] The Chemical Abstracts Service Registry, maintained by the American Chemical Society, is an authoritative database of chemical information. The Registry assigns each chemical substance a unique numeric identifier. Searches in the Registry require subscription. However, EPA maintains on its website a free "Substance Registry System" containing CAS Registry information, including the CAS definition of asbestos. http:// www.epa.gov/srs/ (search "asbestos"; follow link associated with 1332-21-4) (last visited Aug. 3, 2007).

[4] I.e., "1332214 Asbestos"

compound that can be composed of several substances, typically including magnesium. Or, as defined by the CAS Registry, and incorporated by reference into § 7412(b), it is a "grayish non-combustible material" that "consists primarily of impure magnesium silicates." CAS Registry number 1332-21-4, *available at* http://iaspub.epa.gov/srs/srs_proc_qry.navigate?P_SUB_ID=85282. This definition has been established for decades, as was elucidated in the motions in limine. *See* Defs' Mot. in Limine Re: Definition of Asbestos n.4 (Expert Witness Disclosure of Gregory P. Meeker, Appendix A) (May 31, 2006) (noting that asbestos was first defined in 1920).

In addition, defendants had actual notice in this case of the risks from the fibrous content of the asbestiform minerals in their products. Defendants are an industrial chemical company and seven of its top executives. They are all familiar with asbestos. Since at least 1976, defendants have known of the health risks posed by the asbestiform minerals in their products. It is clear that defendants knew or should have known that their mining, milling, and distribution activities risked the release of asbestos into the ambient air. In light of the clear statutory language, including § 7412(b)'s incorporation by reference of the CAS Registry asbestos definition, and defendants' knowledge of the industrial chemicals field, the district court erred in misdefining "asbestos" as used in the criminal statute and in invoking the rule of lenity. *See Muscarello v. United States*, 524 U.S. 125, 138 (1998) ("The rule of lenity applies only if, after seizing everything from which aid can be derived, ... we can

make no more than a guess as to what Congress intended.") (alteration in original) (internal quotation marks omitted); *United States v. Lanier*, 520 U.S. 259, 266 (1997) (The "rule of lenity[] ensures fair warning by so resolving ambiguity in a criminal statute as to apply [the statute] only to conduct clearly covered.").

The district court's conclusion that ambiguity exists simply because of the existence of two oversight structures—a civil regulatory structure and a criminal enforcement provision—that use different definitions of the term "asbestos" is erroneous. As we determined in *United States v. Hagberg*, 207 F.3d 569, 573 (9th Cir. 2000), Congress validly may create multiple enforcement mechanisms that each draw on different definitions for the same term or phrase.

In *Hagberg*, defendant was indicted for allegedly dumping sewage along a public road in violation of the Clean Water Act, 33 U.S.C. §§ 1319(c)(2), 1345(e). *Hagberg* at 570. Moving to dismiss the indictment, *Hagberg* argued that his actions did not fit within the statutory definition of the crime because the material he dumped was not "sewage sludge" as defined by the regulations for permitting waste disposal. *Id.* at 571. Accepting Hagberg's argument, the district court dismissed the indictment. The government appealed. *Id.* We reversed because the district court improperly had conflated the regulatory and direct enforcement provisions of the Clean Water Act, and the relevant definition—supplied by the direct enforcement provision—covered the material dumped by defendant. *Id.* at 571-72, 575. We explained that "some terms found in the [direct enforcement

provision] are defined differently when used in the context of [the civil permitting] regulations." *Id.* at 572.

Like the Clean Water Act provisions at issue in *Hagberg*, the Clean Air Act creates multiple enforcement mechanisms: a civil regulatory structure and a direct enforcement mechanism. In the instant case, as in *Hagberg*, defendants are charged with violating the directly enforceable provision of the statute that pulls its definitions from a separate provision than does the regulatory provision. The civil regulatory system draws its definition of asbestos from 40 C.F.R. § 61.141, the knowing endangerment provision from 42 U.S.C. § 7412(b). *See* 42 U.S.C. §§ 7412(a)(6); 7413(c)(5)(A). The civil regulatory system regulates major sources of hazardous air pollutants, 42 U.S.C. § 7412(c)-(g), and therefore understandably focuses on a subset of asbestifom minerals deemed to have commercial potential; market forces preclude commercially non-viable species of asbestos from becoming major sources of pollution from asbestos mills and mines and other covered sources. The direct enforcement mechanism created in 42 U.S.C. § 7413 focuses on risks to health. Therefore it provides oversight of release of hazardous pollutants whether or not they come from major sources of pollution. We defer to Congress's decision to create two enforcement structures and hold the district court's conflation of the two to be error.

In sum, the district court improperly limited the term "asbestos" to the six minerals covered by the civil regulations. Asbestos is adequately defined as a term and need not include mineral-by-mineral classifications to provide notice of its hazardous

nature, particularly to these knowledgeable defendants. Accordingly, we reverse the order limiting evidence to that fitting within the civil regulations.

III. Mandamus

1. Background

The knowing endangerment provision of the Clean Air Act establishes an affirmative defense for hazardous air pollutants released "in accordance with" an applicable National Emissions Standards for Hazardous Air Pollutants ("NESHAP"). *See* 42 U.S.C. § 7413(c)(5)(A). In the proceedings before the district court, the government argued that defendants could not avail themselves of this affirmative defense because no NESHAP applied to W.R. Grace's operations in Libby; thus, compliance with an "applicable" NESHAP was impossible. The district court rejected this argument, finding that the regulations created an emissions standard of "no visible emissions" for asbestos. Accordingly, the district court ruled that it would allow defendants to introduce evidence at trial to try to prove their affirmative defense. Because the district court did not exclude any of the government's emissions evidence as a result of this ruling, the government cannot appeal the district court's decision. Instead, it now seeks a writ of mandamus to overturn the decision.

2. Standard of Review

The writ of mandamus is codified at 28 U.S.C. § 1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and

principles of law." This court has developed a five-factor test for determining whether a writ may issue. We must consider whether:

(1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he or she desires.

(2) The petitioner will be damaged or prejudiced in a way not correctable on appeal.

(3) The district court's order is clearly erroneous as a matter of law.

(4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.

(5) The district court's order raises new and important problems, or issues of law of first impression.

Clemens v. U. S. Dist. Ct., 428 F.3d 1175, 1177-78 (9th Cir. 2005) (quoting *Bauman v. United States Dist. Ct.*, 557 F.2d 650, 654-55 (9th Cir. 1977)). Not every factor must be present to warrant mandamus relief, *see id.* at 1178, and in this case the only disputed issue is whether the district court made a clear error as a matter of law.

3. Analysis

Where, as here, the district court's order involves issues of statutory interpretation, the order is clearly erroneous as a matter of law if the reviewing court is left with "a definite and firm conviction that the district court's interpretation of the statute was incorrect." *DeGeorge v. United States Dist. Court*, 219 F.3d 930, 936 (9th Cir. 2000) (citing *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1306 (9th Cir. 1982)); *see also United States v. Ye*, 436 F.3d

1117, 1123 (9th Cir. 2006). Here, the plain language of the statute makes clear that the affirmative defense is not applicable to defendants' actions.

In relevant part, § 7413(c)(5)(A) states, "[f]or any air pollutant for which the Administrator has set an emissions standard ..., a release of such pollutant in accordance with that standard ... shall not constitute a violation of this paragraph." The first clause of the affirmative defense makes it inapplicable to Grace's alleged asbestos releases. Quite simply, asbestos is not an "air pollutant for which the Administrator has set *an* emissions standard." § 7413(c)(5)(A) (emphasis added). Rather, the Administrator has set *several* emissions standards, each of which is source dependent. Some asbestos emissions standards make no reference at all to "visible emissions." *See* 40 C.F.R. §§ 61.143, 61.145, & 61.148. Others include additional procedural requirements, above and beyond the "no visible emissions" requirement. *See* 40 C.F.R. §§ 61.142, 61.144, 61.146, 61.149, & 61.150. In short, there is simply no trans-categorical emissions standard for asbestos; neither is there an emissions standard for asbestos releases from mining operations.[5] Therefore, it is inconceivable that the alleged Grace releases were "in accordance with that standard." § 7413(c)(5)(A). The plain language of the statute makes clear that the affirmative defense simply

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[5] A perusal of the table of contents for 40 C.F.R. § 61 shows that most hazardous pollutants do in fact have a single emissions standard, enumerated in a single code section. *See, e.g.*, §§ 61.22, 61.32, 61.42, 61.52. Asbestos, however, does not. *See* §§ 61.142-.151.

doesn't apply in this case. The district court's order to the contrary leaves us with a "a definite and firm conviction" that it got the law wrong. *DeGeorge*, 219 F.3d at 936. Consequently, we grant the government's petition for writ of mandamus, and hold that W.R. Grace can not avail itself at trial of the affirmative defense articulated in 42 U.S.C. § 7413(c)(5)(A).

IV. Evidentiary Rulings

1. Introduction

As stated above, Counts II-IV of the superseding indictment allege violations of 42 U.S.C. § 7413(c)(5)(A), the Clean Air Act's knowing endangerment provision, which creates criminal penalties for a person who "knowingly releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title ... and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury." Defendants filed motions in limine seeking to exclude evidence related to, or testimony based on, certain studies—EPA indoor air studies ("Indoor Air studies"), Grace's historic testing of its vermiculite products ("Historic Testing"), a report of the Agency for Toxic Substances and Disease Registry based on a medical screening study of residents of Libby, Montana ("ATSDR Report"), and the results of the screening study published as an article in a peer-reviewed journal ("Peipins Publication"). Ruling that these studies were unreliable, irrelevant, or unduly prejudicial, the district court barred government experts from relying on them in forming opinions regarding the knowing endangerment charges, and, as to the indoor air studies, the ATSDR Report, and the Peipins Publication,

excluding the studies, report, and publication themselves for most or all purposes. Order, *United States v. W.R. Grace*, 9:05-cr-00007DWM (Aug. 21, 2006) ("Indoor Air Order"); Order, *United States v. W.R. Grace*, 9:05-cr-00007-DWM (Aug. 28, 2006) ("Historical Testing Order"); Order, *United States v. W.R. Grace*, 9:05-cr-00007-DWM (Aug. 31, 2006) ("ATSDR and Peipins Order"). The government appeals.

2. Standard of Review

This court reviews de novo the district court's interpretation of the Federal Rules of Evidence. *United States v. Sioux*, 362 F.3d 1241, 1244 n.5 (9th Cir. 2004). In general, this court reviews for abuse of discretion a district court's decision to admit or exclude scientific evidence and expert testimony. *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002). "[A] trial court has 'broad discretion' in assessing the relevance and reliability of expert testimony." *Id.* (quoting *United States v Murillo*, 255 F.3d 1169, 1178 (9th Cir. 2001)).

3. Relevant Rules

Federal Rule of Evidence 401 defines "relevant evidence" as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402 provides that relevant evidence is admissible, except as limited by the Constitution, statutes, or other rules of evidence. Rule 403 provides a balancing test for the exclusion of relevant evidence on the grounds of prejudice: relevant evidence may be excluded if "probative value is substantially outweighed by the danger of

unfair prejudice, confusion of the issues, or misleading the jury...."[6]

Several rules apply specifically to testimony by experts. Under Rule 702, an expert witness may provide opinion testimony if "the testimony is based upon sufficient facts or data" and "is the product of reliable principles and methods," which have been "applied ... reliably to the facts of the case." The rule "affirms the court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony." Advisory Comm. Notes, Rule 702 (2000).

Under Rule 703, the "facts or data ... upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted." However, if the expert relies on facts or data that are otherwise inadmissible, then those facts "shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the

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[6] Advisory committee notes from 1972 discuss the meaning of unfair prejudice—the "undue tendency to suggest decision on an improper basis, commonly ... an emotional one"—and observe that the "availability of other means of proof may also be an appropriate factor" of determining when there is unfair prejudice.

expert's opinion substantially outweighs their prejudicial effect."[7]

4. Analysis

A. Indoor Air Releases

i. Background

On May 31, 2006, Defendants filed a motion in limine to exclude evidence of or derived from indoor asbestos releases. Defendants sought to exclude documents and studies, including EPA's Phase II air sampling charts, as well as expert testimony that relied upon these studies. *See* Defs' Mot. in Limine Re: Indoor Air Releases at 4-6 (Docket # 473).

On August 28, 2006, the district court granted defendants' motion "with respect to evidence of or derived from indoor releases offered for the purpose of proving an 'ambient air' release in violation of 42 U.S.C. § 7413(c)(5)(A)." Indoor Air Order at 11. The district court held that "[i]ndoor sampling performed by EPA in the course of its CERCLA activities, and testimony based upon this sampling, is not relevant [under Fed. R. Evid. 402] to whether Defendants committed a release in violation of the Clean Air Act, and is not admissible for the purpose of proving such a release." *Id.* at 8. The court stated that, under

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[7] To the extent that inadmissible evidence is reasonably relied upon by an expert, a limiting instruction typically is needed—i.e., the evidence is admitted only to help the jury evaluate the expert's evidence. *E.g., United States v. 0.59 Acres of Land*, 109 F.3d 1493, 1496 (9th Cir. 1997) (error to admit hearsay offered as the basis of an expert opinion without a limiting instruction). There is a presumption against disclosure to the jury of inadmissible information used as the basis for expert's opinion. *See* Advisory Comm. Notes, Rule 703 (2000).

Federal Rules of Evidence 403, "[e]vidence derived from EPA testing and sample collection performed as part of its CERCLA analysis has the potential to be highly confusing and prejudicial," *id.* at 10, and barred the evidence for most purposes related to the Clean Air Act counts. However, the court held that the evidence had probative value with respect to defendants' "knowledge of the dangerousness of the asbestos contaminated vermiculite," *id.* at 8, relevant to the government's argument that defendants knowingly "place[d] another person in imminent danger of death or serious bodily injury," 42 U.S.C. § 7413(c)(5)(A), by releasing vermiculite into the community. In addition, the district court held the evidence relevant to the defrauding object of Count I's conspiracy charge and to the four counts of obstruction of justice in the superseding indictment. The district court thus denied the motion with respect to establishing knowledge of risk for the Clean Air Act charges and with respect to proving the obstruction and conspiracy counts. The government appeals the exclusion of the Indoor Air studies and expert testimony based upon them with regard to the knowing endangerment counts.

ii. Analysis

The government argues that EPA's Phase II tests show the propensity of the Libby asbestos to release fibers whenever it was disturbed and regardless of the form the vermiculite took and therefore should be admitted to form the basis of expert testimony. The government also makes an argument that the Indoor Air studies should themselves be admitted as relevant. However, although the government makes a valid argument about the friability of Libby asbestos being the same whether indoors or

outdoors, the probative value of the EPA studies is possibly outweighed by the danger of unfair prejudice. First, the studies' overall probative value is low because they largely concern the asbestos releases at various indoor locations in Grace's Libby mining and milling operation. There is some information in the studies regarding the friable character of Libby asbestos, but not much. There is a risk of unfair prejudice because the indoor releases may not reflect the level of releases into the ambient air, and there is some language in the studies regarding asbestos-related diseases in Libby that may mislead or confuse the jury into believing that releases into indoor air proves releases into ambient air. Finally, even if this court disagreed with the district court's Rule 403 balancing, "[a]n appellate court will not reengage in a balancing of the probative value and prejudicial effect." *Rogers v. Raymark Industries, Inc.*, 922 F.2d 1426, 1430 (9th Cir. 1991). The district court's decision to bar the use of documents and studies derived from indoor air releases for the purpose of proving a release into the ambient air was within its discretion.

It is a separate question, however, whether the district court abused its discretion in excluding expert testimony based on documents and studies derived from indoor air releases. The district court did not conduct an inquiry under Rule 702[8] or

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[8] Fed. R. Evid. 702 provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

703[9] in its August 28th order. Rule 703 provides, "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, *the facts or data need not be admissible* in evidence in order for the opinion or inference to be admitted." (Emphasis added.) The government persuasively argues that the proper remedy for the problems associated with the indoor air studies is to prevent an expert from disclosing the prejudicial facts instead of preventing the expert from relying on them altogether. Allowing expert testimony based on the EPA studies "will assist the trier of fact to understand the evidence or to determine a fact in issue" under Rule 702 because the studies may show the propensity of the asbestos-contaminated vermiculite to release asbestos fibers into the ambient air. While the specific asbestos concentration levels discussed in the studies are not relevant because the studies largely measured indoor air releases and gathered data under conditions different from the ambient air releases

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[9] Fed. R. Evid. 703 provides, "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."

relevant to the statute, the government's experts should be permitted to opine generally about the friability of Libby asbestos based in part on the data in the studies. The data from the indoor sampling is relevant to the propensity of Libby asbestos to release fibers upon disturbance. Based on these data, an expert could testify about friability and whether a release of asbestos would occur if asbestos-contaminated vermiculite were exposed or disturbed. Because the district court did not inquire into whether the data provided by the indoor air tests is of the type reasonably relied upon by experts in the field, *see* Fed. R. Evid. 703, or whether the data fits under Rule 702, we remand so that the district court can conduct these inquiries in the first instance.

B. W.R. Grace's Historic Product Testing

i. Background

On May 31, 2006, defendants filed a motion in limine to exclude expert opinions regarding Grace's historical, non-ambient air product and commercial testing. Defendants sought to exclude the testimony of Dr. Richard Lemen,[10] Dr. Vernon Rose,[11] Paul Peronard,[12] Dr. Aubrey Miller,[13] Dr. Chris Weis,[14]

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[10] Docket # 287.

[11] Docket # 283.

[12] Docket # 281.

[13] Docket # 279.

[14] Docket # 286.

and other government witnesses who might "attempt to draw unsupportable correlations between Grace's historical product and commercial tests and expected ambient air exposures from disturbances of vermiculite materials found in the town of Libby." Defs' Mot. in Limine Re: Historic Testing at 4 (Docket # 496). On August 29, 2006, the district court granted defendants' motion to exclude expert testimony based on historic testing offered to prove a release in violation of 42 U.S.C. § 7413(c)(5)(A). Historic Testing Order at 7. The district court denied defendants' motion with respect to expert testimony based on historic testing offered for the purpose of showing defendants' knowledge of the dangerousness of the asbestos contaminated vermiculite. *Id.*

ii. Analysis

Rule 702 authorizes expert testimony that "will assist the trier of fact" when the testimony "is based upon sufficient facts or data," the testimony is produced through "reliable principles and methods," and the expert witness "has applied the principles and methods reliably to the facts of the case." Generally, an inquiry under Rule 702 examines the expert's testimony as a whole. The 702 inquiry typically does not examine the reliability or relevance of particular data sets that underlie the expert testimony, although this approach does no harm where the expert testifies on only one study or where no combination or addition of data could make the data in question a proper, reliable basis for making a given claim. In contrast to Rule 702's holistic focus on an expert's testimony, Rule 703 governs the inquiry into the reliability of particular data underlying expert testimony. Fed. R. Evid. 703;

see also Claar v. Burlington Northern R. Co., 29 F.3d 499, 501 (9th Cir. 1994).

Here, the district court excluded the historic testing data under Rule 702. This document-based approach creates the problem that one cannot know fully whether or in what ways other information sources are meant to, in combination with the challenged data sources, form the premise for the expert testimony. Each document must be dispositive under the district court's approach, a requirement we do not impose under Rule 702. On remand, the district court shall conduct the Rule 702 analysis in light of the expert's reasoning and methodology as a whole.

Faced with this new 702 analysis, defendants presumably will argue, as they do on appeal, that the historic testing evidence fails the "fit" test under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).[15] In response, the government argues that its experts do not plan to rely on the historic testing data to estimate the fiber concentrations from the charged releases, but only to opine generally on the hazardous characteristics[16] of Libby asbestos contaminated vermiculite. This limited use of the study to inform experts' opinions is permissible, because the propensity of Libby asbestos to release fibers fits the release element of the knowing

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[15] This phrasing of the argument improperly focuses the 702 inquiry on a document-by-document approach that we disapproved *supra*.

[16] I.e., the propensity of Libby asbestos to break down and release fibers into the ambient air.

endangerment provision. The district court did not consider this propensity-to-release inquiry, thus abusing its discretion by excluding this evidence under 702.

Defendants make two additional, ultimately unsupportable arguments. First, they argue that the testimony's exclusion under Rule 702 was proper because the government's experts "do not need" the evidence on historic air releases to testify about the friability of Libby asbestos. This argument misconceives Rule 702's inquiry, which focuses on fitness, relevance, and reliability, not on whether an expert potentially has other evidence on which to base an opinion. Second, defendants argue that the district court properly excluded the testimony under Rule 403 in addition to Rule 702. Contrary to defendants' assertion, however, the district court did not rely on Rule 403 in its historic testing order but discussed the admissibility of expert testimony only under Rule 702. Moreover, an expert reasonably may rely on inadmissible evidence in forming an opinion or delivering testimony. *See* Fed. R. Evid. 703.

The question remains whether data concerning indoor air quality are of the type reasonably relied on by other experts in the field. *See* Fed. R. Evid. 703. Although it appears that the district court never conducted this 703 inquiry, the second step of the Rule 702 analysis—that the study was "the product of reliable principles and methods"—presumably answers this question in the affirmative. *See* Rule 702; *see also Claar*, 29 F.3d at 501 ("Rule 703 merely relaxes, for experts, the requirement that witnesses have personal knowledge of the matter to which they testify," not whether the requirements of

702 are properly met). Although not stated explicitly, the order implicitly found the historic testing reliable in finding it admissible under 702 to show knowledge. Historic Testing Order at 3-4. Thus, the historic testing is admissible for purposes of expert opinion formation and testimony regarding the propensity of Libby vermiculite to release asbestos as relevant to 42 U.S.C. § 7413(c)(5)(A). Accordingly, we reverse the district court order excluding such testimony.

C. Medical Screening Study: ATSDR and Peipins Publication

i. Background

In 2000-2001, the Agency for Toxic Substances and Disease Registry ("ATSDR") conducted a medical screening study in Libby (the "ATSDR Report") to detect pleural abnormalities in Libby residents and to inform priority-setting in EPA's asbestos clean-up operation. The study entailed interviewing and medically testing individuals who had lived, worked, attended school, or participated in other activities in Libby for at least six months before 1990. Questions were asked to identify individuals who had accessed potential "exposure pathways" to asbestos and vermiculite prior to December 31, 1990. For example, "pathways" included employment at W.R. Grace, living with W.R. Grace workers, using vermiculite for gardening, and engaging in recreational activities in certain locations known to contain vermiculite. Information about other basic demographic variables and risk factors was also gathered, e.g., age, sex, smoking status, history of pulmonary disease and various other self-reported health conditions.

ATSDR published an initial report of the study's findings in February 2001. The complete results of the study (the "Peipins Publication") were published in November 2003 in *Environmental Medicine*, a peer-reviewed journal. The Peipins Publication analysis used regression modeling to estimate the risk of respiratory abnormalities for each of the exposure pathways while controlling for all other pathways and other established and suggested risk factors.

The study showed that certain factors—including exposure to particular pathways—were associated with respiratory illness and abnormalities. The factors most strongly associated with abnormalities were: being a former W.R. Grace employee, being older, having had household contact with a former W.R. Grace worker, and being male. (The study also demonstrated "a statistically significant increase in the prevalence of pleural abnormalities with an increasing number of exposure pathways." While "participants reporting more pathways might be expected to have more cumulative exposure than would those reporting fewer pathways," this was not data gathered by the study; the study identified avenues for exposure but did not quantify the duration or intensity of individuals' exposures.

Both the interim ATSDR Report and the final Peipins Publication noted that the study had no control group and "no directly comparable Montana or U.S. population studies [were] available." The researchers were able to compare the data gathered with studies of other groups with substantive work-related asbestos exposure. The levels of pleural abnormalities were higher in Libby than in studies

of other groups, but the study did not engage in any direct quantitative comparison.[17]

On May 31, 2006, defendants filed a motion in limine "to exclude expert evidence relating to the ATSDR Medical Testing Program." Defs' Mot. in Limine Re: ATSDR (Docket # 500, 502). The district court characterized the motion as one to exclude "any evidence or expert testimony relating to" the medical screening study conducted in Libby by the Agency for Toxic Substances and Disease Registry. ATSDR Order at 1. The government did not object to the court's characterization of defendants' motion. On August 31, 2006, the district court granted defendants' motion. The court ruled that the ATSDR Report and Peipins Publication, and any expert testimony based thereon, were excluded under Rules 403 and 702 for any purpose relating to the Clean Air Act knowing endangerment counts. *Id.* at 31.

ii. Analysis

The district court acted within its discretion in excluding the ATSDR Report and Peipins Publication themselves under Rule 403 for purposes of the knowing endangerment counts. There are limits to the probative value[18] of the particular

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[17] The results of the ATSDR Report were also compared with "control groups or general populations found in other studies." That comparison showed that the levels of pleural abnormalities were also higher in Libby for those who claimed "no apparent exposure" to particular pathways than subjects in other studies. This supported the study's conclusion that it was unlikely that there were individuals in Libby who had not been exposed to some degree.

[18] The study demonstrated an association between negative health outcomes and an individual's unquantified exposure to

correlations the ATSDR Report revealed and potentially prejudicial aspects to the data. Moreover, the government failed to contest the district court's undue prejudice conclusion. Because Rule 403 requires the district court to balance the probative value and the prejudicial effects of a piece of evidence, failure to raise and argue prejudice generally waives the argument. *See United States v. Wilson*, 966 F.2d 243, 245-46 (7th Cir. 1992).

However, in excluding this evidence from informing expert opinion and testimony, the district court erred. The expert is, in the first instance, the judge of what resources would help him to form an opinion, and he can filter out as irrelevant prejudicial information. The trial judge is to assure the reliability of evidence by vetting under Rule 703 the bases underlying the expert's testimony and by examining under Rule 702 the expert's methodology. Here, however, the trial judge misapplied Rule 702 and replaced inappropriately the Rule 703 analysis with one under Rule 403.

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vermiculite via particular "pathways" prior to the statutory period. The existence of association—and not causation—goes to the probative value of the evidence. The reported findings did not indicate that all exposure pathways were significantly associated with lung abnormalities (for example, gardening with vermiculite is not one of the factors mentioned as one being associated with such abnormalities). Because the data were gathered before the statutory period, it is questionable how reliable a basis they provide for drawing conclusions about the extent of the dangers posed by ambient releases during the statutory period, i.e., concentration or duration of releases. However, this is more an issue for the expert than the court.

To begin, the district court concluded that the ATSDR medical screening program and resulting analyses did not establish a causal link between exposure to Libby's vermiculite and the development of asbestos-related disease. The ATSDR Report acknowledged repeatedly that the testing program was not designed as an epidemiological study to show causality. Notably, there was no internal control group and the participants were self-selected, rather than randomly selected. In light of this, the district court concluded that the data could not provide experts with a reliable basis for opining as to causality (i.e., the danger posed by the releases from Libby vermiculite).

Nonetheless, one of the main objectives of the ATSDR Report was to examine the association between pleural and interstitial abnormalities and participants' exposure histories—measured in broad terms by the participants' overall contact with exposure pathways. As the district court acknowledged, the government's experts did not claim that they intended to use the study to show causation, but rather indicated that they would rely on the evidence to show that there were some associations or correlations between exposure to vermiculite in Libby and pleural abnormalities.

The district court took the view that the jury would be unlikely to distinguish between evidence of an association and evidence of causation and therefore would likely be misled, and would place undue reliance on the evidence. In this respect, the court substantially underestimated the capacity of jury instructions to distinguish these relationships, and the potential efficacy of a limiting instruction.

Further, the fact that a study is associational—rather than an epidemiological study intended to show causation—does not bar it from being used to inform an expert's opinion about the dangers of asbestos releases, assuming the study is "of the type typically relied upon" by experts in the field. Fed. R. Evid. 703. Of course, the expert's opinion testimony must satisfy the requirements of Rule 702—but that requires consideration of the *overall* sufficiency of the underlying facts and data, and the reliability of the methods, as well as the fit of the methods to the facts of the case. Fed. R. Evid. 702.

Here, the district court failed to consider the Rule 702 requirements with regard to causation. Instead, as with the historical testing, the court conducted a document-by-document Rule 702 analysis that deconstructed the experts' testimony in a manner not contemplated by Rule 702. Moreover, the study, which was published in a peer-reviewed journal and relevant to association, is adequate under 702. The study's failure to establish causation goes to the weight it should be accorded, but does not mean that an expert could not rely on it in forming an opinion.

Nor did the district court consider the possibility of expert reliance on the ATSDR Report without disclosure of the study itself to the jury, as provided for by Rule 703 ("If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted."). In fact, the district court generally failed to conduct a 703 analysis, such as considering whether this study was "of the type" relied upon by experts in the field, or whether the

ATSDR Report's "probative value ... substantially outweighs [its] prejudicial effect." Fed. R. Evid. 703.

Instead, the district court excluded expert testimony regarding the ATSDR Report under Rule 403. This ruling improperly replaced 703 balancing with 403 balancing, *cf.* Fed. R. Evid. 703 (providing balancing test applicable to expert testimony), and the exclusion of the ATSDR Report and Peipins Publication as bases for expert testimony or opinion formation was error. While Rule 403 supplies a basis for holding the underlying ATSDR Report inadmissible, it does not contemplate barring an expert from relying on it. *Cf.* Fed. R. Evid. 403. The exclusion of the ATSDR Report and the Peipins Publication from expert consideration and testimony was error, and thus we reverse that part of the ATSDR Order.

V. Motion to Strike

In its reply brief to this court, the government submitted six documents not included in the record below—two excerpts of the federal register (addenda 1 and 3), a report of the National Research Council (addendum 2), published scientific articles (addenda 5 and 6), and search results presumably from the CAS Registry (addendum 4). Defendants moved to strike four of the documents (addenda 2, 4, 5, and 6) on the grounds that they were not part of the record below, were misleading, and, by virtue of their submission in the reply brief, were presented without giving defendants an opportunity to respond.

In general, we consider only the record that was before the district court. We have made exceptions to this general rule in three situations: (1) to "correct inadvertent omissions from the record," (2) to "take

judicial notice," and (3) to "exercise inherent authority ... in extraordinary cases." *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003). Considerations of institutional expertise and notice support our limitation of these exceptions to "unusual circumstances." *Id.*

The search results in addendum item 4 fit none of these exceptions. Addendum items 2, 5, and 6 fit within the second exception—we have discretion to take judicial notice under Rule 201 of the existence and content of published articles. *See Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, ___ n.13, 127 S. Ct. 1955, 1973 n.13 (2007); *United States v. Rutgard*, 116 F.3d 1270, 1278 (9th Cir. 1997). However, as we have stated before, the appropriate manner to supplement the record on appeal is "by motion or formal request so that the court and opposing counsel are properly apprised of the status of the documents in question." *Lowry*, 329 F.3d at 1025. The government failed to so move, and thus we grant defendants' motion to strike. However, due to the reversal and remand on certain issues, our ruling here does not preclude application to the district court for inclusion in the district court's record for whatever use is appropriate.

CONCLUSION

We reverse the order dismissing the knowing endangerment object of Count I of the superseding indictment. We reverse the order adopting the regulatory definition of asbestos used for civil regulation and direct that the definition in the criminal statute, i.e., the definition provided in 42 U.S.C. § 7412(b), applies. We grant the government's request for a writ of mandate. We affirm the exclusion of the indoor air studies, the

ATSDR Report, and the Peipins Publication themselves. However we reverse their exclusion—and the exclusion of the historic testing—as bases underlying an expert's opinion or testimony. Finally, we grant defendants' motion to strike the documents included with the government's reply brief to this court.

AFFIRMED in part, **REVERSED** in part, and **REMANDED**.

WRIT OF MANDAMUS GRANTED on one issue.

Filed
Dec 05, 2007
Cathy A. Catterson,
Clerk
U.S. Court of
Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. W.R. GRACE; ALAN R. STRINGER; HENRY A. ESCHENBACH; JACK W. WOLTER; J. MCCAIG; ROBERT J. BETTACCHI; O. MARIO FAVORITO; ROBERT C. WALSH, *Defendants-Appellees.*	No. 06-30472 D.C. No. CR-05-00007-DWM

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. W.R. GRACE; ALAN R. STRINGER; HENRY A. ESCHENBACH; JACK W. WOLTER; WILLIAM MCCAIG; ROBERT J. BETTACCHI; O. MARIO FAVORITO; ROBERT C. WALSH, *Defendants-Appellees.*	No. 06-30524 D.C. No. CR-05-00007-DWM

Before: B. FLETCHER, PREGERSON, and FERGUSON, Circuit Judges.

Judge Pregerson has voted to deny the petitions for rehearing en banc and Judges B. Fletcher and Ferguson so recommend.

The full court has been advised of the petitions for rehearing en banc and no judge has requested a

vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing en banc are denied.

Filed
Missoula, MT
2006 Aug 7 AM 10:54
PATRICK E. DUFFY
By: _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA MISSOULA DIVISION

UNITED STATES OF AMERICA, *Plaintiff* vs.	)	CR 05-07-M-DWM
W.R. GRACE, ALAN R. STRINGER, HENRY A. ESCHENBACH, JACK W. WOLTER, WILLIAM J. MCCAIG; ROBERT J. BETTACCHI; O. MARIO FAVORITO, ROBERT C. WALSH, *Defendants.*	)	ORDER

I. Introduction

The difficult question presented now is what the Congress meant when it used the term "asbestos." How the word is defined has significant legal ramifications in this criminal case. The definition of "asbestos" sets the parameters of the Clean Air Act's criminal prohibitions and affects the likelihood that alleged conduct in this case will be deemed criminal. If the word "asbestos" as applied in the criminal law includes varieties of winchite and richterite the criminal case involved here is dramatically different than if "asbestos" is defined as the phrase has historically been used by every governmental regulatory agency to address the issue.

The issue gets resolved through motions in limine filed by all parties seeking a ruling on the definition of the term "asbestos" as it appears in the Clean Air Act, 42 U.S.C. § 7412(b)(1).[1] The government urges the Court to adopt a broad reading of the term to include all of the minerals comprising what the government calls "Libby amphibole." The Defendants argue that the proper definition is the narrower one set forth in the regulations implementing the Clean Air Act, which excludes the minerals that comprise the majority of the amphibole found in Libby. For the reasons that follow, I find that the limited definition advocated by the Defendants applies to the Clean Air Act offenses charged in this case.

II. Background

The Superseding Indictment alleges that the vermiculite mined in Libby was contaminated with amphibole asbestos "composed of a family of closely related minerals including tremolite, winchite, richterite, actinolite and others." Superseding Indictment (Doc. No. 590) at ¶4. According to the Superseding Indictment, "[t]his amphibole asbestos has been commonly called 'tremolite.'" *Id.* However, the United States Geological Survey (USGS), working in conjunction with the Environmental

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[1] The motions at issue are the government's Motion in limine # 2 to Exclude Evidence and Argument that Defendants Were Regulated by the Clean Air Act's NESHAPs Program (Doc. No. 462) and the Defendants' Joint Motion in limine to Exclude Evidence Based on Sample Results Indicating the Presence of Fibers from Minerals that do not Constitute "Asbestos" Under the Clean Air Act (Doc. No. 474, filed by Defendant Bettacchi on behalf of all Defendants).

Protection Agency (EPA) on the Libby clean-up, analyzed the amphibole at the Libby mine and concluded that "approximately 84% of the amphiboles can be classified as winchite, 11% as richterite, and 6% as tremolite." Exhibit C to Supplemental Expert Witness Disclosure of Gregory P. Meeker, p. 1959.

The EPA acknowledged the reality on the ground in Libby when its Office of Air Quality Planning and Standards issued a report titled *Action Plan: Air Emission from Sources of Contaminant Asbestos.* The report states on page 2: "The asbestiform minerals found at the Libby, MT site were originally thought to be tremolite asbestos, but more specifically may be the asbestiform varieties of winchite and richterite, neither of which is regulated explicitly by any EPA regulation."

The Defendants are charged in Counts II through IV of the Superseding Indictment with violating the Clean Air Act's knowing endangerment provision.[2] The knowing endangerment offense is codified at 42 U.S.C. § 7413(c)(5)(A), which provides in part:

> Any person who knowingly releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section 7412 of this title, and who knows at the time that he thereby

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[2] Defendant Grace is charged alone in Count II; Counts III and IV name Defendants Grace, Stringer, Wolter and Bettacchi. Superseding Indictment at ¶¶ 185-190.

> places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment of not more than 15 years, or both.

Section 7412(a)(6) defines "hazardous air pollutant" as "any air pollutant listed in [Section 7412(b)]." Section 7412(b)(1) provides a compendium of hazardous air pollutants listed by their chemical names and in most cases accompanied by the corresponding Chemical Abstract Services (CAS) number. Included on the list is "Asbestos," along with its CAS number 1332214.

Although the criminal knowing endangerment provision of 42 U.S.C. § 7413(c)(5)(A) refers to § 7412 for its list of proscribed pollutants, § 7412 is not a criminal statute. It is part of a civil regulatory scheme intended to set emissions standards for certain regulated sources of pollution. Following the 1990 Amendments to the Clean Air Act, EPA was required to identify categories of sources[3] for each of

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[3] There are two types of sources relevant to this discussion. A "major source" is

> any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants.

42 U.S.C. § 7412(a)(1).

An "area source" is "any stationary source of hazardous air pollutants that is not a major source." 42 U.S.C. § 7412(a)(2).

the pollutants listed in § 7412(b)(1). Congress then directed EPA to promulgate regulatory emissions standards for all major sources and for those selected area sources which EPA determines present a threat of adverse health effects. 42 U.S.C. § 7412(a)(1)-(3), (c)(1)-(3), (d)(1). These standards are known as National Emissions Standards for Hazardous Air Pollutants, or NESHAPs. This statutory command was accompanied by a savings provision at 42 U.S.C. § 7412(q)(1), which clarified that pre-existing regulatory standards in effect under the prior version of the section would remain in effect following the 1990 Amendments.

One such pre-existing standard was set forth in regulations established in response to the enactment of the Clean Air Act of 1970. The regulations, established in 1973, set emissions standards for asbestos. 38 Fed. Reg. 8820, 8826 (April 6, 1973). The regulations include a definition of asbestos for purposes of § 7412 of the Clean Air Act that has been substantially unchanged since 1973 and was in effect at the time of the 1990 Amendments to the Act. The definition is codified at 40 C.F.R. § 61.141 and states: "*Asbestos* means the asbestiform varieties of serpentinite (chrysotile), riebeckite (crocidolite), cummingtonite-grunerite, anthophyllite, and actinolite-tremolite."[4] Section 61.141 appears under

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[4] Similar definitions of "asbestos" appear elsewhere in the regulatory state, including: 29 C.F.R. § 1910.1001 (adopted by OSHA); 30 C.F.R. § 71.702(a) (adopted by MSHA); 16 C.F.R. § 1304.3(b) (adopted by CPSC); and 40 C.F.R. § 763.163 (adopted by EPA). Also, Congress similarly defined "asbestos" in the Asbestos Hazard and Emergency Response Act ("AHERA"), 15 U.S.C. § 2642(3), enacted in 1986.

the *heading* "Subpart M-National Emission Standard for Asbestos." Also under that heading is 40 C.F.R. § 61.140, which states: "The provisions of this subpart are applicable to those sources specified in §§ 61.142 through 61.151, 61.154, and 61.155." The parties agree that Defendant Grace's Libby mine was not a regulated source under § 61.140 and was therefore not subject to the civil regulatory emissions standards established under that subpart.

The Defendants argue that § 61.141's six-species definition of asbestos is nonetheless applicable in this case because that regulation interprets § 7412(b)(1), which in turn supplies the identification of hazardous air pollutants for § 7413(c)(5)(A), the section defining the criminal offense. The United States argues that the six-species definition should not apply because it appears in a civil regulation and therefore cannot be relied upon to define the content of a criminal offense. The parties have attempted to force a resolution of this dispute once before, but the Court deferred consideration of the matter until trial. *See United States v. W.R. Grace,* 429 F. Supp. 2d 1207, 1238 (D. Mont. 2006).

Since then, the parties' expert disclosures have revealed that each side intends to present expert testimony that assumes that the legal definition of "asbestos" for purposes of the Clean Air Act will be the one it favors. The government's witnesses intend to give opinions on the dangers of "Libby amphibole," the composite of all minerals found in Libby

including winchite and richterite.[5] The Defendants have retained expert witnesses who intend to testify that winchite and richterite are not regulated by any federal agency.[6] If the legal dispute is left unresolved, the jurors will hear lengthy and potentially confusing testimony from two distinct sets of experts offering opinions based on different standards which cannot both be correct. How asbestos is defined is a legal question that when answered will dictate the nature and kind of proof that can be presented to the jury.

III. Analysis

A. Legal standard

The pending motions present a question of statutory construction. Because this is an issue of statutory construction, the parties' extensive citation to one another's historical positions on the interpretation and applicability of the emissions regulations is not helpful. Evidence of a party's previously adopted interpretation, whether it be the government or the Defendants, is no use in determining what Congress intended in enacting 42 U.S.C. § 7413(c)(5)(A). In this regard, allegations that a party is attempting to "have it both ways" are

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[5] *See* for example expert witness disclosures for government witnesses Gregory P. Meeker, James Millette, Christopher Weis and Aubrey Miller.

[6] *See* for example expert witness disclosures for defense witnesses Charles Blake, Arthur Langer, Elizabeth Anderson, Joseph Rodricks, Mickey Gunter, Richard Lee, Fred Pooley and John Addison.

particularly inapposite, as the canons of statutory construction do not employ principles of estoppel.

In interpreting a criminal statute to determine what it means, courts must look first to the language of the statute, and second to the legislative history of the law. *United States v. Weitzenhoff*, 35 F.3d 1275, 1283 (9th Cir. 1994). A court should seek to "give effect to the plain, common-sense meaning of the enactment without resorting to an interpretation that defies common sense." *United States v. Bonilla-Montenegro*, 331 F.3d 1047, 1051 (9th Cir. 2003) (internal quotation marks omitted). The plain language of the statute is to be ignored only when a literal interpretation of the statute would thwart the purpose of the statutory scheme and lead to an absurd result. *County of Santa Cruz v. Cervantes*, 219 F.3d 955, 960 (9th Cir. 2000). Courts should also reject any interpretation that would render another statutory provision surplusage or a nullity. *Id.* at 961. Resort to the legislative history for aid in interpreting a statute is only appropriate when the terms of the statute are ambiguous. *Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) ("Unless exceptional circumstances dictate otherwise, when we find the terms of a statute unambiguous, judicial inquiry is complete." (internal quotation marks omitted)).

When a criminal statute's meaning remains ambiguous after application of the rules of statutory construction, the rule of lenity requires that the law be interpreted to cover only conduct that clearly falls within its scope. *United States v. Lanier*, 520 U.S. 259, 266 (1997); *United States v. Shabani*, 513 U.S. 10, 17 (1994).

B. Discussion

1. The Court's prior CERCLA Order

The government first argues that this Court has already decided the matter at issue during the EPA's civil enforcement action against Grace. The government cites the March 9, 2001 Order in which the Court wrote, "The Action Memorandum demonstrates a 'reasonable basis' to believe that asbestos contamination is a problem in Libby. The conclusion is as plain to see as the East Front of the Rocky Mountains." *United States v. Grace*, 134 F. Supp. 2d 1182, 1188 (D. Mont. 2001). The government argues that because this finding was "not limited to one of the six commercial types of asbestos," Govt.'s Br. (Doc. No. 462) at p. 5, it constitutes a finding that all of the "Libby amphibole," including winchite and richterite, is asbestos for purposes of the Clean Air Act.

The flaws in the government's argument are self-evident. The 2001 Order was issued in the context of a civil clean-up action under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). It did not consider or rule upon any provision of the Clean Air Act, particularly the criminal part of that law. Moreover, the language of the opinion is an analysis of whether the EPA had a reasonable basis to believe there may have been at the time a "release or threat of release of a hazardous substance or pollutant or contaminant" under CERCLA, 42 U.S.C. § 9604(e)(5)(B). CERCLA defines "pollutant or contaminant" very broadly to include, but not be limited to:

> [A]ny element, substance, compound, or mixture, including disease-causing agents,

> which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring ....

42 U.S.C. § 9601(33). Given this broad definition, it is clear that the Court could have found that EPA had a rational basis for its belief that there was a present threat of a release of a hazardous pollutant or contaminant without necessarily finding that winchite and richterite are "asbestos" for purposes of the Clean Air Act. The CERCLA statute strives to clean and restore the environment. The criminal part of the Clean Air Act seeks to establish culpability for harmful events in the environment that cause serious risks to the well being of humans.

2. Interpretation of 42 U.S.C. §§ 7413(c)(5)(A) and 7412(b)(1)

Section 7413(c)(5)(A) poses a difficult interpretative challenge because it draws its definition of "hazardous air pollutant" from § 7412, which is a civil regulatory statute. The matter is complicated by the existence of a NESHAP Program regulation promulgated under § 7412 that defines "asbestos." Normally, an implementing regulation is a legitimate place to search for clarification of the meaning of a statute. On the other hand, the language of § 7412(b)(1) includes not just the word asbestos but also a corresponding CAS number,

suggesting that Congress felt the proper path to an interpretation runs through the CAS registry. Regardless of which path one follows, the conclusion is an ambiguous statute that must be construed so that it criminalizes only conduct that is clearly prohibited.

If reading the Clean Air Act's criminal knowing endangerment provision is confined to the text of the statute, the reader is left with a general description of "asbestos" as one of the prohibited hazardous air pollutants. The government urges the Court to confine its reading of the statute to that single word definition, which would make the jury's finding regarding this element dependent entirely on expert testimony as to what minerals constitute asbestos. But as is clear from reading the CAS registry (discussed in greater detail below), the Code of Federal Regulations, and the many expert disclosures filed in this case, there is not a consensus on the definition of asbestos. A defendant on trial for releasing "asbestos" would be apprehensive about the prospect of his fate turning on which expert the jury found most persuasive in describing which minerals fall within the scope of the criminal offense. More problematic is that disputed expert testimony would define an element of the offense, a matter that is the province of the court. Thus, § 7412(b)(1)'s use of the term "asbestos" fails to provide the requisite fair warning about what conduct is considered criminal. *See Lanier*, 520 U.S. at 266-267.

But the text of the statute is not all there is to go on in determining what conduct has been proscribed. The regulations implementing § 7412 provide the six-species definition of asbestos advocated by the Defendants. The government argues that reference

to the regulations is inappropriate because "this is not a NESHAPs case." Govt.' s Reply Br. at p. 2. The argument is correct on that point, and the Defendants have not argued otherwise. Even so this is not a civil case either, yet § 7413(c)(5)(A) relies upon a civil regulatory statute (§ 7412(b)(1)) for its listing of hazardous air pollutants. The conundrum the government must explain is why reliance on a civil statute is permissible but reliance on a civil regulation is not.

The answer from the government is that the regulatory definition does not apply because it is part of a regulatory scheme that did not govern Grace's Libby operation. Because the Libby amphibole is a contaminant in the vermiculite mined by Grace, the Libby mine was not a regulated source under the NESHAPs Program. 40 C.F.R. § 61.140. As a result, the government argues, the definition of asbestos supplied in the NESHAPs regulations does not apply to this case. The Defendants point out that the government's position would give the word "asbestos" two different meanings within the same statute. If the release comes from a regulated source under 40 C.F.R. § 61.140, then the substance released is asbestos only if it is one of the six species listed in 40 C.F.R. § 61.141. If on the other hand the same substance is released from an unregulated source such as the Libby mine, then, according to the government, the definition of asbestos is broader. The government does not clarify the boundaries of this "broader" definition, except to say that it includes winchite and richterite.

To bolster its argument the government notes that Congress, in enacting AHERA in 1986, included the six-species definition within the text of the

statute. According to the government, AHERA shows that when Congress means for the six-species definition of asbestos to apply, it is capable of saying so in the statutory text. This argument fails to account for the fact that there were Clean Air Act regulations adopting the six-species definition of "asbestos" in place at the time of the 1990 Amendments to the Act. That regulatory definition remained in effect after the 1990 Amendments pursuant to the savings provision in § 7412(q)(1).[7] So while Congress did not expressly define "asbestos" in the text of the statute as it did in AHERA, Congress did expressly adopt the existing regulatory standards, including the definition of "asbestos" found at 40 C.F.R. § 61.141. Congress also adopted the regulatory language limiting the applicability of the NESHAPs Program to a list of sources that does not include Grace's Libby operation. *See* 40 C.F.R. § 61.140.

Statutory ambiguity exists when a single-word definition of a hazardous air pollutant can have two different meanings depending on the manner of the release. The government wants to ignore the NESHAPs regulations because they are not part of the statute. The problem with that argument is that § 7412 contemplates and in fact requires that regulations be promulgated to establish national emissions standards. 42 U.S.C. § 7412(a)(1)-(3),

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[7] 42 U.S.C. § 7412(q)(1) provides in part: "Any standard under this section in effect before the date of enactment of the Clean Air Act Amendments of 1990 [Nov. 15, 1990] shall remain in force and effect after such date unless modified as provided in this section before the date of enactment of such Amendments or under such Amendments."

(c)(1)-(3), (d)(1). Without the regulations § 7412(b)(1)' s listing of hazardous air pollutants is meaningless. Absent reference to the regulations a citizen is left with no guidance about prohibited conduct except the unsatisfactory one-word definition of asbestos in § 7412(b)(1). The statute creates an ambiguity. Section 7412's reference to "asbestos" does not provide fair notice as to which minerals are hazardous air pollutants; the statute's implementing NESHAPs regulations provide a definition, but the civil regulatory nature of the NESHAPs Program renders the applicability of the regulations questionable in the criminal context.

Reliance upon the CAS number for asbestos provides no greater clarity. Section 7412(b)(1) includes CAS numbers for nearly every pollutant listed in that section. Of the few pollutants lacking CAS numbers, the statute provides definitions for all but one. This leads to an inference that the CAS number is intended to serve a definitional function in § 7412(b)(1).

The Chemical Abstract Service is a division of the American Chemical Society. The CAS registry itself is a privately maintained database that cannot be directly accessed unless a fee is paid. The United States points out much of the database's content appears to be available on the EPA's website. Each CAS registry entry consists of a list of information fields for each entry. Information fields include "CAS Registry Number," "Chemical Name," "Molecular Formula," "Heading Parent," "Definition," and many others.

The "Definition" field for the entry found at the CAS registry number for asbestos (1332214) gives the following definition for asbestos: "A grayish,

noncombustible fibrous material. It consists primarily of impure magnesium silicate minerals."[8] The government argues that this is where the inquiry should end because the definition is sufficient to put the Defendants on notice as to what conduct is prohibited. The government is correct that the written definition provided in the CAS entry is more detailed than § 7412(b)(1)' s simple reference to "asbestos," but it does not follow that the more detailed definition provides fair notice in the sense that it clearly encompasses the minerals winchite and richterite. To the contrary, further examination of the CAS classification system suggests that winchite and richterite do not fall within the registry's definition of asbestos.

Each of the six minerals included in the regulatory definition of asbestos has a separate entry in the CAS registry under its own unique CAS number. In each of those entries, the "heading parent" is listed as "asbestos," followed by a listing of the name of the individual mineral.[9] The CAS

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[8] *See* Attachment 2 to Govt.'s Reply Br. (Doc. No. 631). This document belies the Defendants' contention that the CAS entry for asbestos does not include a definition.

[9] The following are excerpts from the relevant listings (the field "NM" stands for "Name Modification"):

For chrysotile:

MOLECULAR FORMULA: Unknown
CA NAME(S):
HP=Asbestos
NM=chrysotile
OTHER CA NAMES:
HP=Chrysotile asbestos

For grunerite:

MOLECULAR FORMULA: Unknown
CA NAME(S):
HP=Asbestos
NM=grunerite
OTHER CA NAMES:
HP=Amosite asbestos

For crocidolite/riebeckite:

For tremolite:

registry includes several separate listings that contain the terms "winchite" and "richterite." Unlike the CAS entries for the six species listed in the NESHAPs regulations, none of the entries for winchite and richterite lists asbestos as the heading parent, nor does the term "asbestos" appear elsewhere in the entries relating to those two minerals. Instead, the heading parent for each entry is listed as "winchite" or "richterite." *See* Attachments 11-15 to Exhibit 1 to Defs.' Resp. Br. (Doc. No. 581).

A thorough examination of the CAS registry provides strong clues that winchite and richterite are not included in the CAS definition of asbesto-. The government argues that any CAS entry other than the one for "asbestos" under the number listed in § 7412(b)(1) is irrelevant. I disagree. The issue here is what the statute tells an actor about the

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MOLECULAR FORMULA: Unknown
CA NAME(S):
HP=Asbestos
NM=crocidolite
OTHER CA NAMES:
HP=Crocidolite asbestos
HP=Crocidolite
HP=Asbestos
NM=riebeckite
HP=Asbestos
NM=magnesioriebeckite
HP=Riebeckite

MOLECULAR FORMULA: Unknown
CA NAME(S):
HP=Asbestos
NM=tremolite
OTHER CA NAMES:
HP=Tremolite asbestos

For anthophyllite:

MOLECULAR FORMULA: Unknown
CA NAME(S):
HP=Asbestos
NM=anthophyllite
OTHER CA NAMES:
HP=Anthophyllite asbestos

For actinolite:

MOLECULAR FORMULA: Unknown
CA NAME(S):
HP=Asbestos
NM=actinolite
OTHER CA NAMES:
HP=Actinolite asbestos

Attachments 2-7 to Exhibit 1 to Defs.' Resp. Br. (Doc. No. 581).

scope of illegal conduct. It is a question of fair notice. Here the statute refers to a private registry that is not likely to be discovered or examined except by a sophisticated actor. Upon finding the entry for asbestos there is a general definition but no clarification with respect to which minerals are included within that definition. It is a fair inference that such a sophisticated actor might then investigate further within the registry in hopes of learning more about the scope of the criminal offense. When he does so, he finds information suggesting that the six species listed in 40 C.F.R. § 61.141 are considered asbestos, while winchite and richterite are not.

What matters is that this reading of § 7412(b)(1) is not implausible. From the guidance that Congress has given, a person could reasonably conclude that releases of winchite and richterite are not illegal under the Clean Air Act's knowing endangerment provision. That conclusion would appear even more reasonable to an actor who seeks clarification in the implementing regulations and finds a definition of "asbestos" that coincides with the six species having the heading parent "asbestos" in the CAS registry. From this finding follows the inescapable conclusion that §§ 7413(c)(5)(A) and 7412(b)(1) do not clearly place interested parties on notice of the illegality of releases of winchite and richterite. A court violates due process when it attempts to apply "a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Lanier*, 520 U.S. at 266.

The Defendants ask the Court to invoke the rule of lenity. The Supreme Court applied the rule of

lenity in a case involving an earlier version of the Clean Air Act. Addressing a question of statutory interpretation, the Court wrote:

> At the very least, it may be said that the issue is subject to some doubt. Under these circumstances, we adhere to the familiar rule that, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.

Adamo Wrecking v. United States, 434 U.S. 275, 284-285 (1978) (citations, internal quotation omitted).

The Supreme Court's language describes the situation in this case. The Clean Air Act's knowing endangerment provision sends an actor in two different directions in search of a definition of the hazardous air pollutant asbestos. One leads to a highly technical, privately maintained chemical database that fails to clarify what minerals are covered. The other requires reference to a civil regulatory scheme that does not apply to all releases and has never governed releases from the Libby mine. A reasonable person who searches both the CAS registry and the NESHAPs regulations could fairly conclude that winchite and richterite are not covered by § 7412(b)(1); neither the statute, the regulations, or the CAS registry explicitly includes those minerals in the definition of "asbestos." It must then be said that the definition of "asbestos" for purposes of the Clean Air Act's knowing endangerment offense is subject to some doubt.

That doubt must be resolved in favor of the Defendants, which means that the statute must be construed to apply "only to conduct clearly covered." *Lanier*, 520 U.S. at 266. The conduct clearly covered by § 7413(c)(5)(A) is the knowing release of any of

the six species of asbestos listed in 40 C.F.R. § 61.141 and appearing under the heading parent "asbestos" in the CAS registry, i.e., the asbestiform varieties of serpentinite (chrysotile), riebeckite (crocidolite), cummingtonite-grunerite, anthophyllite, and actinolite-tremolite. This is the definition upon which the jury will be instructed at trial.

3. Admissibility of the government's sampling data and expert testimony

The Defendants request sweeping evidentiary rulings based on the Court's construction of §§ 7413(c)(5)(A) and 7412(b)(1). It is my sense that specific rulings are best delayed until the Court has an opportunity to consider the foundation for each piece of evidence or opinion testimony. This may occur through the consideration of other pending motions in limine or through the attempted introduction of evidence at trial. It is clear from the record, however, that some portion of the government's sampling data and expert testimony is inadmissible. At a minimum, any sampling data that commingles the minerals making up what the government calls "Libby amphibole," without differentiating between minerals covered by the Clean Air Act and minerals not covered, is inadmissible under Fed. R. Evid. 403.

There is an intolerable risk of unfair prejudice should the government be allowed to put on expert after expert testifying that the Defendants endangered others through the release of a deadly composite of minerals without stating with any certainty what percentage of the minerals released are covered by the criminal statute under which the Defendants are charged. The Defendants in that

case would be left in the position of having to argue to the jury that although the proof shows that people were endangered by a release of the potentially deadly minerals winchite and richterite, no crime results because the statute does not cover the minerals released. In light of the comparatively low percentage of covered minerals present in the "Libby amphibole," the probative value of such undifferentiated sampling is far outweighed by the prejudicial effect of the evidence. Expert testimony based on undifferentiated samples is probably inadmissible under Fed. R. Evid. 702 and the relevance prong of *Daubert* because it does not "fit" the facts of the case. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591-593 (1993).

IV. Order

Based on the foregoing, IT IS HEREBY ORDERED that the government's Motion in limine # 2 to Exclude Evidence and Argument that Defendants Were Regulated by the Clean Air Act's NESHAPs Program (Doc. No. 462) is DENIED.

IT IS FURTHER ORDERED that the Defendants' Joint Motion in limine to Exclude Evidence Based on Sample Results Indicating the Presence of Fibers from Minerals that do not Constitute "Asbestos" Under the Clean Air Act (Doc. No. 474) is GRANTED insofar as the definition of "asbestos" for purposes of the Clean Air Act Counts (Counts II through IV) is limited to the asbestiform varieties of serpentinite (chrysotile), riebeckite (crocidolite), cummingtonite-grunerite, anthophyllite, and actinolite-tremolite.

IT IS FURTHER ORDERED that evidentiary rulings based on this Order will be made on a case-

by-case basis in subsequent orders resolving pending motions in limine, or at trial.

DATED: this 7th day of August, 2006.

/s/
DONALD W. MOLLOY, Chief Judge
United States District Court